Supreme Court, U.S.
FILED

No. —— 991995 JUN 12 2000

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IN THE

Supreme Court of the United States

ENVIROCARE OF TEXAS, INC.; ENVIROCARE OF UTAH, INC.;
KHOSROW B. SEMNANI; CHARLES A. JUDD;
FRANK C. THORLEY,
Petitioners,

VS.

WASTE CONTROL SPECIALISTS, LLC,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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103pp

QUESTIONS PRESENTED

I. WAS IT ERROR FOR THE COURT OF APPEALS TO CONCLUDE THAT REMOVAL WAS INAPPROPRIATE ON THE GROUND THAT "ARTFUL PLEADING" REMOVAL CAN ONLY BE PROPER IN CASES INVOLVING COMPLETE PREEMPTION OF STATE LAW?

II. WAS IT ERROR FOR THE COURT OF APPEALS TO VACATE THE DISTRICT COURT'S 12(b)(6) DISMISSAL OF PLAINTIFF-RESPONDENT'S CLAIMS ON THE GROUND THAT THE CASE HAD BEEN IMPROPERLY REMOVED, NOTWITHSTANDING THAT PLAINTIFF-RESPONDENT, AFTER REMOVAL, AMENDED ITS PLEADING TO (a) SEEK DAMAGES UNDER THE FEDERAL SHERMAN AND CLAYTON ANTITRUST ACTS AND (b) AFFIRMATIVELY PLEAD THE EXISTENCE OF FEDERAL COURT JURISDICTION BASED ON NUMEROUS FEDERAL JURISDICTIONAL STATUTES?

III. WAS IT ERROR FOR THE COURT OF APPEALS TO HOLD THAT THE DISTRICT COURT LACKED JURISDICTION TO ENTER JUDGMENT, ON THE GROUND THAT THE CASE HAD BEEN IMPROPERLY REMOVED, NOTWITHSTANDING THAT THE EFFECTIVE PLEADING AT THE TIME OF JUDGMENT WAS ONE THAT SOUGHT RELIEF UNDER FEDERAL LAW AND PLED THE EXISTENCE OF FEDERAL JURISDICTION?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners Envirocare of Texas, Inc., Envirocare of Utah, Inc., Khosrow B. Semnani, Charles A. Judd, and Frank C. Thorley certify the following disclosure statement:

> Envirocare of Texas, Inc. (shareholders Khosrow B. Semnani and Charles A. Judd)
>
> Envirocare of Utah, Inc.(sole shareholder Khosrow B. Semnani)

There is no parent of either company. No publicly held company owns either of the companies' stock.

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OPINIONS BELOW

The initial opinion of the Court of Appeals (App. A, 1a-13a) is reported at *Waste Control Specialists, LLC v. Envirocare of Texas, Inc.*, 199 F.3d 781 (5th Cir. 2000).

The amended opinion of the Court of Appeals (App. E, 60a-61a) is reported at *Waste Control Specialists, LLC v. Envirocare of Texas, Inc.*, 207 F.3d 225 (5th Cir. 2000).

The opinions of the District Court (App. B-D, 14a-59a) are unreported.

BASIS FOR JURISDICTION

The initial opinion and judgment of the United States Court of Appeals for the Fifth Circuit reversing the decision of the District Court of the Western District of Texas were filed on January 18, 2000. App. A, F. The final judgment of the Court of Appeals, granting Petitioners' petition for panel rehearing and denying Petitioners' petition for rehearing en banc, was filed on March 15, 2000. App. E. This petition for a writ of certiorari is filed within 90 days of the latter date. 28 U.S.C. section 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

15 U.S.C. section 4. Jurisdiction of courts; duty of United States attorneys; procedure:

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

15 U.S.C. section 15. Suits by persons injured:

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any

shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b) Amount of damages payable to foreign states and instrumentalities of foreign states

(1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) of this section an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if—

(A) such foreign state would be denied, under section 1605(a)(2) of Title 28, immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

(c) Definitions

For purposes of this section –

(1) the term "commercial activity" shall have the meaning given it in section 1603(d) of Title 28, and

(2) the term "foreign state" shall have the meaning given it in section 1603(a) of Title 28.

15 U.S.C. section 26. Injunctive relief for private parties; exception; costs:

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or

association, except the United States, to bring suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of title 49, United States Code. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

28 U.S.C. section 1331. Federal question:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. section 1337. Commerce and antitrust regulations; amount in controversy, costs:

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: *Provided, however*, That the district courts shall have original jurisdiction of an action brought under section 11706 or 14706 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where a plaintiff who files the case under section 11706 or 14706 of title 49, originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of any interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) The district courts shall not have jurisdiction under this section of any matter within the exclusive jurisdiction of the Court of International Trade under chapter 95 of this title.

28 U.S.C. section 1367. Supplemental jurisdiction:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

28 U.S.C. section 1441. Actions removable generally:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such

action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

28 U.S.C. section 1446(b). Procedure for removal:

....(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in

court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

Tex. Bus. & Comm. Code section 15.04. Purpose and Construction:

The purpose of this Act is to maintain and promote economic competition in trade and commerce occurring wholly or partly within the State of Texas and to provide the benefits of that competition to consumers in the state. The provisions of this Act shall be construed to accomplish this purpose and shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes to the extent consistent with this purpose.

Rule 12(b)(6), Federal Rules of Civil Procedure. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings:

....**(b) How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of

process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

STATEMENT OF THE CASE

Plaintiff-Respondent Waste Control Specialists ("WCS") sued Defendants-Petitioners Envirocare of Texas, Envirocare of Utah, Semnani, Judd, and Thorley (collectively referred to as "Envirocare") in Texas state court in May 1997. WCS' state court petition alleged violations of the Texas Antitrust Act (Tex. Bus. & Comm. Code sections 15.01 et seq.) as well as various state tort claims. R. 349.

In March 1998, WCS filed in the state court an amended petition, again alleging violations of the Texas Antitrust Act. R. 274. Within 30 days, Envirocare removed the case to the United States District Court for the Western District of Texas. 28 U.S.C. section 1446(b). Removal jurisdiction was based on 28 U.S.C. sections 1331 and 1441. R. 1.

Removal was based on the amended petition's clarification that WCS sought damages pertaining solely to waste disposal

services purchased by the United States government. Envirocare believed that since the Texas Antitrust Act by its terms protects only Texas consumers in the relevant market, and since WCS had for the first time made clear that no such Texas consumer interest was implicated, the case set out in the amended petition did not implicate the Texas Act and must be assessed under the Sherman Act—despite WCS' "artful pleading" of state law only.

WCS' motion for remand was denied and the case proceeded in the District Court. App. C, D.

WCS then amended its pleading by asking for, and receiving, leave to file a "Second Amended Complaint" in the District Court. R. 1367. This pleading no longer contained any claims under the Texas Antitrust Act, but instead contained numerous claims based on the federal Sherman and Clayton antitrust acts. The Second Amended Complaint also unequivocally invoked federal jurisdiction:

> This Court has jurisdiction over the federal antitrust claims pursuant to 15 U.S.C. Sections 4, 15, and 26, and 28 U.S.C. Sections 1331 and 1337. This Court has supplemental jurisdiction over the state tort claim pursuant to 28 U.S.C. Section 1367, in that the stat claim arises out of the same operative facts as the federal claims.

R. 1373.

Discovery had been proceeding all along, with trial set for mid-September 1998. R. 2327-28. WCS was ready for trial by late August 1998, when it stated that discovery had gone on long enough and that "we ARE ready to try this case NOW." R. 2329 (emphasis in original).

Then, on August 31, 1998, the District Court granted Envirocare's motion to dismiss WCS' claims under Rule 12(b)(6). App. B. Envirocare had filed that motion in April

1998, shortly after removal. R. 620. The District Court ruled that WCS' claims, on their face, were barred by the *Noerr-Pennington* doctrine, which immunizes First Amendment petitioning activity from antitrust scrutiny.

WCS appealed, arguing that the District Court acted without jurisdiction (notwithstanding that WCS had pled the existence of such jurisdiction). WCS' argument was based in part on the assertion that removal had been inappropriate because the artful pleading doctrine applies only in cases where federal law completely preempts state law.

Envirocare responded that artful pleading removal is not limited to complete-preemption cases. Envirocare also argued that, in any event, WCS had waived or rendered moot its objection to removal when WCS amended its pleading after removal to add Sherman and Clayton Act claims and to invoke federal court jurisdiction.

The Court of Appeals held that removal on artful pleading grounds had been error because this case does not involve complete federal preemption of state law. The Court of Appeals interpreted this Court's decision in *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470 (1998) as dramatically changing the law in this area. According to the Court of Appeals, *Rivet* holds that it is inappropriate to remove a case on "artful pleading" grounds unless it is one of the narrow class of cases involving complete federal preemption of state law.

Petitioners contend that the Court of Appeals mis-interpreted *Rivet*, and that this Court should clarify the meaning of *Rivet* on this point.

The Court of Appeals also ruled that WCS had not waived or rendered moot its objection to federal jurisdiction despite its post-removal filing of a Second Amended Complaint asserting federal claims and federal jurisdiction. The Court of Appeals' decision is flatly contrary to this Court's unanimous

decision in *Caterpillar v. Lewis*, 519 U.S. 61 (1996), wherein this Court held:

> We hold that a District Court's error in failing to remand a case improperly removed is not fatal to the *ensuing* adjudication if federal jurisdictional requirements are met at the time judgment is entered.

519 U.S. at 64.

This Court should correct the Court of Appeals' error, and should resolve the conflict that currently exists in the Circuit Courts regarding whether a post-removal assertion of federal claims cures an improper removal and furnishes the District Court with jurisdiction, even if the District Court's ensuing adjudication is in the form of an order granting a motion to dismiss.

On March 15, 2000, the Court of Appeals denied Envirocare's petition for rehearing en banc and granted Envirocare's motion for rehearing concerning assessment of fees and costs under 28 U.S.C. section 1447(c). Envirocare has filed its petition for writ of certiorari within 90 days of that date.

REASONS FOR GRANTING THE WRIT

I. The court below erred by holding that removal on "artful pleading" grounds can never be proper unless the case involves complete federal pre-emption of state law.

There is a conflict in the lower courts on the question of whether this Court's decision in *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470 (1998) re-wrote the law of "artful pleading" removal.[1] The court below read *Rivet* to mean that

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[1] "Artful pleading" in this context refers to an exception to the "well-pleaded complaint" rule, *i.e.*, a state court plaintiff may not avoid removal

removal on artful pleading grounds is now improper in all cases except those involving complete preemption of state law. Other courts, and noted commentators, take a different position.

If the Court of Appeals' view of *Rivet*'s effect is correct, then decades of contrary case law will have been written out of existence. Traditionally, as noted commentators have observed, the law has been that federal jurisdiction is proper despite artful pleading in at least two categories of cases other than cases involving complete preemption, including suits requiring adjudication of a federal issue. A. Miller, "Artful Pleading: A Doctrine in Search of Definition," 76 Texas L. Rev. 1781, 1784 (1998); 14B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* section 3722 at 436-45 (1998).

The court below interpreted certain language in *Rivet* as effecting a fundamental change in the law, even though this Court in *Rivet* did not say that such was the Court's intention and even though, just a few years earlier, this Court had stated that "*one* corollary of the well-pleaded complaint rule" is complete preemption—not "the only" corollary. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987) (emphasis added).

The Court of Appeals, having inferred that this Court in *Rivet* meant to transform the law despite *Rivet*'s silence on the subject, then proceeded to implement its interpretation of *Rivet*. And so it held, based on *Rivet*, that "[w]ithout complete preemption, the artful pleading doctrine does not apply." *Waste Control Specialists, LLC v. Envirocare of Texas, Inc.*, 199 F.3d 781, 783 (5th Cir. 2000) (App. 4a). On that basis, the Court of Appeals concluded that this case should not have been removed, and thus vacated a Rule

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by "artfully pleading," in state law terms only, a case that is truly federal in nature.

12(b)(6) dismissal with which the Court of Appeals expressed no disagreement whatsoever.

The Court of Appeals' interpretation of *Rivet* is wrong, and should now be corrected. It is contrary to the many cases establishing the propriety of federal jurisdiction—outside of the complete-preemption context—where a plaintiff's case involves federal issues even though plaintiff has pled its case in state law terms only.[2]

Citing Supreme Court precedent, Professor Wright's treatise discusses and rejects the notion that *Rivet* should be read to limit artful pleading removal to cases arising in the complete-preemption context. The treatise notes while a few cases have reached this conclusion, "the view these cases express hardly can be considered very well established." 14B Wright, Miller & Cooper, *supra*, section 3722 at 445 (1998).

Professor Wright's treatise notes the confusion in the lower courts over the meaning of *Rivet*. It states that removal on "artful pleading" grounds has long been deemed appropriate

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[2] *See, e.g., Merrill Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986); *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921). Many such cases arose in the same context as the present case: where removal was upheld on artful pleading grounds even though the state court antitrust plaintiff had sought to assert only claims based on state antitrust law, and where preemption was not at issue. *See, e.g., In re NASDAQ Market-Makers Antitrust Litigation*, 929 F. Supp. 174 (S.D.N.Y. 1996) (state case purportedly based on state antitrust law could be removed under artful pleading doctrine; no preemption involved); *Mechanical Rubber & Supply Co. v. American Saw & Manuf. Co.*, 747 F. Supp. 1292, *vacated in part on other grounds*, 810 F. Supp. 986 (C.D. Ill. 1990) (same); *Patriot Cinemas, Inc. v. General Cinema Corp.*, 1987-1 Trade Cases (CCH) ¶ 67,453 (D. Mass. 1986), *vacated and remanded on other grounds*, 834 F.2d 208 (1st Cir. 1987) (same); *Buchanan v. Delaware Valley News*, 571 F. Supp. 868 (E.D. Pa. 1983) (same); *In re Wiring Device Antitrust Litigation*, 498 F. Supp. 79 (E.D.N.Y. 1980) (same); *Three J Farms, Inc. v. Alton Box Board Co.*, 1979-1 Trade Cases (CCH) ¶ 62,423 (D.S.C. 1978) (same); *Prospect Dairy, Inc. v. Dellwood Dairy Co.*, 237 F. Supp. 176 (N.D.N.Y. 1964) (same).

in not one but "three distinct classes of cases," *id.* at 436, but it acknowledges that *Rivet* has raised a question in the lower courts as to whether artful pleading is now limited to complete-preemption cases. *Id.* at 445-47. *See also* Miller, supra, at 1826 (discussing "hint" contained in *Rivet* that some courts have interpreted as limiting artful pleading removal to complete-preemption cases).

Professor Wright's treatise explains why, contrary to the Court of Appeals' opinion, this Court's decision in *Rivet* should not be read as re-writing this entire body of law—even though some language in *Rivet* might give some credence to a contrary view. The treatise deems it "extremely unlikely" that *Rivet* means what the Court of Appeals' opinion says it means—that in any non-complete-preemption case, a plaintiff may engage in "artful pleading" and a federal court that might wish to expose the charade will be powerless to do so. 14B Wright, Miller & Cooper, *supra*, section 3722 at 447. *See also* Miller, supra, at 1826-27 (rejecting view that Court in *Rivet* intended to silently overrule prior case law and restrict artful pleading removal to complete-preemption cases only).

As noted above, if the view expressed by the Court of Appeals is in fact correct, then the countless cases upholding removal on artful pleading grounds outside the complete-preemption context have now been overruled. But, as Professor Wright's treatise explains, if this Court in *Rivet* had intended such a dramatic shift in the law, it surely would have made this clear. "It simply is implausible that the Court—unanimously—was transmogrifying . . . by silence" the law in this area as stated by, *inter alia*, two prior Supreme Court cases. 14B Wright, Miller & Cooper, *supra*, section 3722 at 447. *See also* Miller, *supra*, at 1827 (deeming it "rather unlikely" that Court in *Rivet* intended to fundamentally alter this area of the law).

Contrary to the Court of Appeals' decision, many post-*Rivet* decisions continue to indicate that artful pleading

removal is not limited to complete-preemption cases.[3] Shortly after the Fifth Circuit's decision in the instant case was issued, for example, the Ninth Circuit took a completely contrary view of *Rivet*'s effect, stating that "artful pleading" removal is not limited to complete-preemption cases but can occur in three separate classes of cases, in keeping with the traditionally held view. *See Arco Environmental Remediation, LLC v. Department of Health and Environmental Quality*, 2000 U.S. App. 11453 at *10-11 (9th Cir. 2000).

But other cases share the view taken by the Court of Appeals here, and now restrict removal in this context to cases involving complete preemption.[4] The result is

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[3] *See, e.g., Desaigoudar v. California Micro Devices Corp.*, 1999 U.S. App. Lexis 1067 (9th Cir. 1999); *Fax Telecommunicaciones, Inc. v. AT&T*, 138 F.3d 479, 486-87 (2d Cir. 1998); *Kobaissi v. American Country Life Ins Co.*, 80 F. Supp. 2d 488 (E.D.Pa. 2000); *Caravanas v. Hall*, 1999 U.S. Dist. Lexis 12741 (E.D. La. 1999); *Reynolds v. Ferguson*, 73 F. Supp. 2d 841, 844 (W.D. Mich. 1999); *Archer v. Arms Technology, Inc.*, 72 F. Supp. 2d 784, 787 (E.D. Mich. 1999); *Lowe v. NASD Regulation, Inc.*, 1999 U.S. Dist. Lexis 19489 (D.D.C. 1999); *Schappel v UICI*, 1999 U.S. Dist. Lexis 19444 (N.D. Tex. 1999); *Mendoza v. Burgos*, 31 F. Supp. 2d 35, 38 (D.P.R. 1998); *Temptations, Inc. v. Wager*, 26 F. Supp. 2d 740, 743 (D.N.J. 1998); *Popular Democratic Party v. Commonwealth*, 24 F. Supp. 2d 184, 188-89 (D.P.R. 1998); *Portage County Board of Commissioners v. Akron*, 12 F. Supp. 2d 693, 698 (N.D. Ohio 1998); *Baron v. Strassner*, 7 F. Supp. 2d 871, 873 (S.D. Tex. 1998); *Case v. Webb*, 1998 U.S. Dist. Lexis 21679 (S.D. Fla. 1998); *Westwood Nursing Center v. Haveman*, 1998 U.S. Dist. Lexis 20584 (E.D. Mich. 1998); *Village of Alden v. Cablevision Indus., Inc.*, 1998 U.S. Dist. Lexis 20339 (W.D.N.Y. 1998).

[4] *See, e.g., Goepel v. National Postal Mail Handlers Union*, 36 F.3d 306, 311-12 (3d Cir. 1994), *cert. denied*, 514 U.S. 1063 (1995); *M. Nahas & Co. v. First National Bank*, 930 F.2d 608, 612 (8th Cir. 1991); *Crooks v. Certified Computer Consultants, Inc.*, 92 F. Supp. 2d 582 (W.D. La. 2000) (following Court of Appeals' decision in the instant case); *XF Enterprises, Inc. v. BASF Corp.*, 1999-2 Trade Cases (CCH) ¶ 72,699 (E.D. Pa. 1999); *Shaw v. TCI/TKR of Northern Kentucky, Inc.*, 67 F. Supp. 2d 712 (W.D. Ky. 1999); *Harris v. Deaconess Health Services Corp.*, 61

uncertainty on the part of courts and litigants on a basic issue of federal jurisdiction.

Indeed, one court has even found support in *Rivet* for the proposition that removal on artful pleading grounds is proper when the state plaintiff has omitted necessary federal claims in order to artificially prevent removal. *Archer v. Arms Technology, Inc.*, 72 F. Supp. 784, 787 (E.D. Mich. 1999). Here, of course, the Court of Appeals read *Rivet* as having exactly the opposite meaning.

It is evident that there is great confusion in the lower courts on this question. This case presents an opportunity for this Court to clarify and settle this area of the law, and to correct the error made by the Court of Appeals.

II. The court below failed to follow *Caterpillar v. Lewis* by holding that a plaintiff's post-improper-removal invocation of federal jurisdiction can never act as a waiver of plaintiff's objection to federal jurisdiction, and can never cure the initial jurisdictional defect, if the District Court happens ultimately to decide the case under Rule 12(b)(6).

The Court of Appeals wasted a District Court adjudication of a federal Constitutional issue on the ground that removal to the District Court had been improper. This was not only highly inefficient, but more importantly it was error, because by the time the District Court issued its judgment it clearly had obtained jurisdiction. Even assuming *arguendo* that jurisdiction was initially lacking, any such defect was cured when WCS, after removal, amended its pleading in a manner that undoubtedly conferred jurisdiction on the federal court.

F. Supp. 2d 889 (E.D. Mo. 1999); *Moubry v. Kreb*, 58 F. Supp. 2d 1041, 1045 (D. Minn. 1999); *Orthotic Sales & Service, Inc. v. La Rosa*, 1998 U.S. Dist. Lexis 12181 (E.D. Pa. 1998).

When a case has been improperly removed and plaintiff's motion for remand has been improperly denied, the ensuing federal court adjudication may not be vacated if, by the time judgment is entered, post-removal events have occurred that confer jurisdiction on the federal court. The lack of federal jurisdiction initially is irrelevant to the validity of the subsequent federal court judgment if federal jurisdiction has come to exist by the time judgment is entered. This rule was established in the Court's unanimous decision in *Caterpillar v. Lewis*, 519 U.S. 61, 64 (1996):

> We hold that a District Court's error in failing to remand a case improperly removed is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered.

The Court of Appeals erred in failing to follow that holding, which applies squarely to the facts of this case. Federal jurisdictional requirements had been satisfied as of the time of the District Court's judgment because WCS, after removal, filed an amended pleading that invoked federal law and federal jurisdiction in the plainest possible terms:

> This Court has jurisdiction over the federal antitrust claims pursuant to 15 U.S.C. Sections 4, 15, and 26, and 28 U.S.C. Sections 1331 and 1337. This Court has supplemental jurisdiction over the state tort claim pursuant to 28 U.S.C. Section 1367, in that the state claim arises out of the same operative facts as the federal claims.

R. 1373.

But after the District Court dismissed WCS' claims, WCS argued to the Fifth Circuit that the very federal jurisdiction that WCS had expressly invoked and relied upon in its Second Amended Complaint did not exist after all, and indeed had never existed. WCS may as well have inserted the words "unless we lose" after the word "jurisdiction" in the

above-quoted pleading. And the Court of Appeals, instead of rejecting this somewhat unseemly and manipulative "now you see it, now you don't" approach to federal court jurisdiction, took the bait.

So it is that the very plaintiff who sought a fortune in damages under the Sherman Act and the Clayton Act, and who sought to press those "federal claims" in federal court under six different sections of the United States Code, and who was so eager to try those claims that it protested even the slightest delay in the District Court's trial date, was able to say—*with success*—that in fact there had never been federal jurisdiction at all.

Of course, had WCS prevailed in federal court, it would have kept quiet about the supposed absence of federal jurisdiction. That is to say that the WCS was given a "no lose" proposition by the Court of Appeals: win the case in the District Court, or lose without consequence since the Court of Appeals will say that none of the federal proceedings meant anything anyway.

The inequity and wastefulness of this outcome is evident. It is terrible policy to allow litigants to play games with the jurisdiction of the federal courts. It is nonsensical to erase a well-reasoned federal court adjudication of a Constitutional issue, entered after plaintiff had pled federal claims and federal jurisdiction, so that the case can be sent to a state court judge who will be asked to assess precisely the same issue already considered and ruled upon in the now-vacated federal court opinion. Justice certainly is not served by any of this. And this outcome cannot possibly be squared with the *Caterpillar* holding.

The Court of Appeals concluded that the District Court did not have jurisdiction at the time of judgment. *Waste Control Specialists*, 199 F.3d at 784 (App. 7a) (District Court order was "issued without jurisdiction"). This cannot possibly be

correct in light of WCS' own pleading, quoted above. If federal jurisdiction was initially lacking, that problem was undoubtedly cured by WCS' subsequent invocation of and reliance upon federal antitrust law and federal jurisdictional statutes.

Indeed, the error made by the Court of Appeals in this case is precisely the same as that made by the Sixth Circuit in *Caterpillar*. There, too, the court had wrongly concluded that the District Court adjudication should be erased because of an improper removal. But this Court noted that federal jurisdiction had been created prior to judgment (as in this case), so that "the Sixth Circuit erred in resting its decision on the absence of subject-matter jurisdiction." 519 U.S. at 73. And so it is here.

The Court of Appeals' decision is the product of a strained and erroneous effort to avoid the clear holding of *Caterpillar* and instead to apply a prior decision from the Fifth Circuit, *Kidd v. Southwest Airlines Co.*, 891 F.2d 540 (5th Cir. 1990).

The Court of Appeals, focusing on *Kidd* rather than *Caterpillar*, ruled that a post-removal amendment to assert federal claims and federal jurisdiction cannot waive or moot plaintiff's prior objection to federal jurisdiction unless the District Court's ensuing adjudication happens to have been one that can be classified as "on the merits." *Waste Control Specialists*, 199 F.3d at 785 (App. 7a). But nothing in the *Caterpillar* holding supports such an approach.

The Court of Appeals held that a 12(b)(6) dismissal can never be "on the merits" for purposes of the *Kidd* decision and on that basis held that the District Court's dismissal must be vacated, *Caterpillar* notwithstanding. *Waste Control Specialists*, 199 F.3d at 786 (App. 10a).

In so holding, the Court of Appeals misapplied the law established by this Court in *Caterpillar*. At the very least, there is a conflict in the Circuit Courts as to the proper

outcome when the "ensuing adjudication" to which *Caterpillar* refers is made pursuant to a motion to dismiss. *Compare Barbara v. New York Stock Exchange*, 99 F.3d 49 (2d Cir. 1996) and *Vector Research, Inc. v. Howard & Howard*, 76 F.3d 692 (6th Cir. 1996) (indicating that federal jurisdiction is proper in this context and the ensuing adjudication is valid even though the court decides the case by granting a motion to dismiss) *with Chivas Products Ltd. v. Owen*, 864 F.2d 1280 (6th Cir. 1988), *Kidd*, *supra*, and the instant decision (indicating that federal jurisdiction in this context would be improper, and the ensuing adjudication can be erased, if adjudication is made pursuant to a motion to dismiss).[5]

The Court of Appeals concluded that if the District Court bases its dismissal on Rule 12(b)(6), then the District Court must be deemed to have acted without jurisdiction the entire time and the judgment must be erased. But if the case is decided under some rule other than 12(b)(6) (*e.g.*, Rule 56 or after a trial), then according to the Court of Appeals it is correct to find that plaintiff's amendment waived or mooted its objection to removal, it is correct to conclude that the District Court obtained jurisdiction, and the judgment must not be erased. *Waste Control Specialists*, 199 F.3d at 785-87 (App. 7a-11a). How can precisely the same act—amendment

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[5] In *Koehnen v. Herald Fire Ins. Co.*, 89 F.3d 525 (8th Cir. 1996), the court upheld the validity of the post-improper-removal adjudication where the District Court's decision, while not based on Rule 12(b)(6), was nonetheless a simple dismissal on a purely legal question. Additional cases from the Fourth, Sixth, Seventh, and Tenth Circuits lend further support to Envirocare's position. *Akin v. Ashland Chemical Co.*, 156 F.3d 1030 (10th Cir. 1998), *cert. denied*, 526 U.S. 1112 (1999); *Aqualon Co. v. Mac Equipment, Inc.*, 149 F.3d 262 (4th Cir. 1998); *Herron v. International Ass'n*, 1998 U.S. App. Lexis 1322 (6th Cir. 1998); *Bernstein v. Lind-Waldock & Co.*, 738 F.2d 179 (7th Cir. 1984); *Cades v. H&R Block, Inc.*, 43 F.3d 869 (4th Cir. 1994), *cert. denied*, 515 U.S. 1103 (1995).

of the complaint post-removal to add federal claims—be waiver (jurisdiction upheld) if the case is later decided under Rule 56 or by trial but not waiver (retroactively stripping jurisdiction) if the case is later decided under Rule 12(b)(6)?

It is inappropriate to rest the waiver/no waiver (and, in the Court of Appeals' view, the jurisdiction/no jurisdiction) determination on the happenstance of what rule the District Court later invokes in ultimately adjudicating the claims. A party's waiver is determined by the party's actions, not the court's. The waiver occurs (and federal jurisdiction is established) when the plaintiff, in Judge Posner's words, "throws in the towel" post-removal to amend its complaint to add claims based expressly on federal law.[6]

Certainly, this Court's holding in *Caterpillar* does not allow for the sort of *post hoc* jurisdiction erasure that appears to be possible under *Kidd*. *Caterpillar*'s simplicity—if jurisdiction exists at the time of judgment, the judgment stands despite initial improper removal—is its virtue.

If the Court of Appeals is correct, and if a bright line exists in this context between Rule 12(b)(6) dismissals and all other forms of adjudication, then Rule 12(b)(6) will be written out of the law in any case where a plaintiff, having lost its motion for remand, then files an amended pleading in federal court, asserting claims grounded in federal law. Any sensible defendant, having read the Court of Appeals' opinion, would conclude that filing a Rule 12(b)(6) motion in such circumstances would be a complete waste of time. Only two things could happen: one, defendant would lose the motion. Two, defendant would win the motion, but that victory would be overturned on appeal on the precedential authority of the Court of Appeals' decision in the instant case.

Why should a perfectly good rule, aimed at conserving judicial resources by disposing of claims that lack merit, be

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[6] *Bernstein v. Lind-Waldock Co.*, 738 F.2d 179, 185 (7th Cir. 1984).

disabled in this way? Why should the same adjudication, based on the same Constitutional grounds, be valid if based one rule but erased if based on another rule—with the added extreme peculiarity that in the latter case the District Court will for some reason be deemed to have acted without jurisdiction the entire time? The purpose of the modern Federal Rules is to avoid this sort of artificiality, so that justice might be done.

Indeed, it is evident that Envirocare, by not ensuring that the District Court's constitutionally based rejection of plaintiff's claims was grounded in Rule 56 rather than Rule 12(b)(6), has been placed by the Court of Appeals' opinion into precisely the sort of "procedural booby trap"[7]—having only to do with form, having nothing to do with substance, or merit, or justice—that the modern Federal Rules seek first and foremost to abolish.

There is no doubt that the Court of Appeals was wrong to conclude that the District Court lacked jurisdiction at the time judgment was entered and on that basis to vacate the judgment. *Waste Control Specialists*, 199 F.3d at 783-84 (App. 3a-7a). The Court of Appeals may have believed that federal jurisdiction was lacking *at the time of removal.* But that does not necessarily mean that the District Court lacked jurisdiction *at the time of judgment.*

Caterpillar makes it abundantly clear that these are two different issues. More importantly, as noted above, *Caterpillar* holds that a District Court judgment may *not* be cast aside—even if there was no jurisdiction at the time of removal—if subsequent events in federal court confer such jurisdiction and thus moot the initial jurisdictional defect.[8]

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[7] *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966).

[8] 519 U.S. at 64. Indeed, within days of the initial opinion in this case, a different panel of the Fifth Circuit, following *Caterpillar*, made clear that an initial jurisdictional defect, resulting from improper removal, can

It bears emphasis that this Court so ruled notwithstanding that plaintiff in *Caterpillar* had filed a timely motion for remand and that such motion was, in the view of this Court, erroneously denied by the District Court. This Court held that these factors—which it may be assumed are also present here—were trumped by "overriding consideration[s] . . . of finality, efficiency, and economy"—which this Court deemed "overwhelming." 519 U.S. at 75. Precisely the same can be said here.

Thus it is impossible to square the Court of Appeals' opinion with the following admonition by the Court in *Caterpillar*:

> To wipe out the adjudication postjudgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice.[9]

The Court of Appeals said that the "overriding considerations" upon which *Caterpillar* was based were "arguably . . . not implicated" (*Waste Control Specialists*, 199 F.3d at 785 n.2) (App. 8a) because the instant case, unlike *Caterpillar*, is not a diversity case. The Court of Appeals reasoned that wastefulness is a concern in diversity cases because the federal court judgment at risk of being wasted is one that applied state law just as the state court would have. But surely it is clear that the same may be said here (indeed with greater force): that the federal District Court would assess the First Amendment principles underlying the *Noerr-Pennington* doctrine in the same manner as would the state court. If the judiciary is properly reluctant to waste a District Court decision applying state law in a diversity case, then

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be cured by post-removal events. *Engler v. Winfrey*, 201 F.3d 680, 686 (5th Cir. 2000) (*per curiam*).

[9] 519 U.S. at 77.

should it not be even more hesitant to waste a District Court decision applying federal Constitutional law?

This Court should inform the lower courts that *Caterpillar* is indeed the law and that the sort of analysis engaged in by the Court of Appeals in this case is inappropriate.

Moreover, even assuming that *Kidd*'s "on the merits" requirement has any meaning after *Caterpillar*, the court below was wrong to conclude that a Rule 12(b)(6) dismissal can never act as a decision "on the merits."

The heart of the Court of Appeals' opinion is found at 199 F.3d at 786-87 (App. 9a-11a). There the court said that WCS' filing of federal claims had not waived or mooted WCS' objection to federal jurisdiction. The court based this conclusion on the fact that the District Court's judgment was made pursuant to Rule 12(b)(6).

Applying *Kidd*'s "on the merits" language, the Court of Appeals said that the "on the merits" requirement cannot possibly be met by a 12(b)(6) order: "Though the reach of the expression 'trial on the merits' is unclear in this context, we hold that it stops short of a Rule 12(b)(6) dismissal." *Waste Control Specialists*, 199 F.3d at 786 (App. 9a-10a).

The 12(b)(6) dismissal here was based on the District Court's application of an immunity doctrine founded on the First Amendment, as embodied in the *Noerr-Pennington* doctrine. This case is not about some technical pleading deficiency. Even assuming the Fifth Circuit's *Kidd* analysis survives after *Caterpillar*, whatever *Kidd* means by "on the merits" must surely be satisfied by a District Court's decision that a claim cannot be stated because it is barred by the United States Constitution.

Moreover, the dismissal in this case could just as easily have been made under Rule 56 instead of Rule 12(b)(6)—in fact, *more* easily, since Rule 12(b)(6) is the far more lenient

test. *According to the Court of Appeals, this would have made all the difference.* Had this occurred, the District Court's judgment would stand because the Court of Appeals would have viewed it as "on the merits" adjudication—which, according to the Court of Appeals, is the crucial question. *See Waste Control Specialists*, 199 F.3d at 786 (App. 10a) (summary judgment would be "on the merits" for purposes of *Kidd*).

It is ironic that because the District Court was able to dispose of WCS' claims even when giving WCS the benefit of the pro-plaintiff bias embodied in Rule 12(b)(6)—and thus did not even need to assess factual material (as under Rule 56) to conclude that the First Amendment barred WCS' claims—that this very fact is what enabled the Court of Appeals to conclude that the District Court's decision could be erased (when a Rule 56 adjudication could not be erased).

The illogic is rooted in the Court of Appeals' insistence on an "on the merits" adjudication, and its further insistence that a decision pursuant to Rule 12(b)(6) can never qualify. The Court of Appeals said that "[w]ithout any factual review as applied to the plaintiff's allegations, the 'merits' of a plaintiff's case have not been sufficiently addressed for purposes of this [*Kidd*] issue." 199 F.3d 786-87 (App. 10a). Clearly the Court of Appeals was saying that had WCS' pleading just been a bit stronger—so that the District Court would not have been able to reject the case without assessing facts under Rule 56—then the "on the merits" requirement would have been satisfied and the District Court's judgment would stand. It is a perverse rule of law that makes a District Court's dismissal of a weaker case more vulnerable than its dismissal of a stronger one.

The Court of Appeals' message is as unfortunate as it is clear. Any future District Court in the Fifth Circuit that wishes to protect its judgment in this context should not save judicial resources by dismissing a facially invalid claim under

Rule 12(b)(6). Instead, it should go through the entirely meaningless and wasteful exercise of performing the Court of Appeals' requisite "factual review"—so that the District Court's adjudication will receive the all-important "on the merits" label, and thus will not subject to erasure under *Kidd*. Fifth Circuit litigants are encouraged to play the "factual review/on the merits" game too: dismissal in this context should now be sought exclusively via a motion for summary judgment, even if plaintiff's claim could be more efficiently disposed of without any evidentiary review under Rule 12(b)(6). Moving under Rule 12(b)(6) in this context simply leads to the *Waste Control Specialists v. Envirocare* trap.

It makes no sense to waste a District Court assessment of a federal Constitutional issue on the ground that the court acted under one rule rather than another. Nor does it make sense to give the plaintiff a brand new opportunity in state court on the ground that its pleading failed even the most lenient test available under the Federal Rules (Rule 12(b)(6)) when such an opportunity would not be made available had a more rigorous test been applied (Rule 56). Nor does it make sense to force District Courts and litigants to avoid the use of a rule that heretofore has proven to be an efficient mechanism for the prompt adjudication of facially invalid claims.

This Court should not let stand the flawed reasoning embodied in the Court of Appeals' opinion.

CONCLUSION

For the reasons stated herein, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Fifth Circuit and, ultimately, to reverse the Court of Appeals' decision.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed Jan. 18, 2000]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50952

WASTE CONTROL SPECIALISTS, LLC,
Plaintiff-Appellant,

versus

ENVIROCARE OF TEXAS, INC.; *et al.*,
Defendants,

ENVIROCARE OF TEXAS, INC.; ENVIROCARE OF UTAH, INC.;
KHOSROW B. SEMNANI; CHARLES A. JUDD;
FRANK C. THORLEY,
Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Texas, Midland

Before REYNALDO G. GARZA, JOLLY, and WIENER, Circuit Judges:

The issues presented in this appeal are, first, whether the district court erred in failing to remand this antitrust and business tort case to the state court by concluding that the complaint fell within the artful pleading doctrine and, second, whether the plaintiff waived its right to challenge federal jurisdiction because, after its efforts to remand had failed, it amended its complaint to state a federal claim.

I

The dispute between the appellant, Waste Control Specialists, L.L.C. ("WCS"), and the appellees, Envirocare of Texas, Inc., *et al.* (collectively, "Envirocare"), revolves

around WCS's bid to enter the market for disposal of low-level radioactive and mixed waste.

WCS brought this suit against Envirocare in Texas state court alleging that "Envirocare conceived and implemented a plan to destroy WCS' ability to compete in the low-level radioactive and mixed waste business." WCS pled exclusively state law causes of action. They ranged from allegations of violation of the Texas Free Enterprise and Antitrust Act of 1993, Tex. Bus. & Com. Code § 15.05(b) (1987) ("Texas Antitrust Act"), to business tort claims. Specifically, WCS alleged that Envirocare used its monopoly position improperly to prevent WCS from obtaining the approval of the state of Texas for its project. The alleged impropriety turned, first, on allegations of false and defamatory communications to state regulatory officials regarding the WCS project. Second, WCS charged that Envirocare engaged in a sham effort to create a competing facility in Andrews County, Texas. WCS alleged that the sole purpose of this effort in Andrews County was to incite a backlash against WCS based on citizen fear of that county becoming a toxic dumping ground. Naturally, Envirocare denied those allegations. Additionally, Envirocare raised the *Noerr-Pennington* affirmative defense, i.e., that these activities were immune from suit because efforts to influence public officials cannot violate antitrust laws.

Ten months after filing its original state petition, WCS filed an amended petition, apparently restricting its allegations to the non-commercial waste market—a market with only one consumer of disposal services, i.e., the only generator of non-commercial waste, the United States Department of Energy. At that point, Envirocare removed the action to federal district court. It asserted that, because the only customer for noncommercial waste market is the federal government, the single viable claim propounded by WCS must be based on federal antitrust law, notwithstanding that WCS's complaint made no reference to any federal law.

The district court agreed and, asserting the artful pleading doctrine, denied WCS's motion to remand. In filing its motion to remand, WCS objected strenuously to what it considered Envirocare's improper removal. It also filed a motion to reconsider the order denying remand. After its unsuccessful efforts to have the case remanded, WCS faced Envirocare's motion to dismiss. The district court strongly suggested that WCS's only potentially viable claim was a federal one. Accordingly, WCS amended its complaint expressly to allege a violation of the Sherman Act. Despite this amendment, on Envirocare's Fed. R. Civ. P. 12(b)(6) motion, the district court dismissed WCS's complaint, reasoning that Envirocare's activities were protected under the *Noerr-Pennington* doctrine.[1]

II

We review *de novo* denials of motions to remand. *See Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362,

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[1] We have explained this doctrine as follows:

> The *Noerr-Pennington* doctrine "allows individuals or businesses to petition the government, free of the threat, of antitrust liability, for action that may have anti-competitive consequences. *Noerr-Pennington* protection is grounded on the theory that the right to petition guaranteed by the First Amendment extends to petitions for selfish, even anticompetitive ends." *Greenwood Utilities Comm'n v. Mississippi Power* Co., 751 F.2d 1484, 1497 (5th Cir 1985). The doctrine was announced in *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), where the Supreme Court held that the Sherman Anti-Trust Act did not bar an association of railroad companies from seeking legislation and regulations destructive of the trucking industry. The Court has expanded this holding to encompass the petitioning of other public officials besides legislators. *See United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965); *Real Estate Investors v. Columbia Pictures*, 508 U.S. 49, 113 S.Ct. 1920, 123 L.Ed.2d 611 (1993).

Brown & Root, Inc. v. Louisiana State AFL-CIO, 10 F.3d 316, 325 (5th Cir. 1994).

365 (5th Cir. 1995). The district court rejected WCS's motion to remand on the basis that the artful pleading doctrine applied. The court reached this conclusion notwithstanding the fact that the Sherman Act does not completely preempt the Texas Antitrust Act. The district court recognized that WCS's claim under the Texas Antitrust Act was not one subject to complete federal preemption. Indeed, the district court explicitly noted that federal antitrust law does not preempt Texas' antitrust law. *See Pounds Photographic Labs, Inc. v. Noritsu America Corp.*, 818 F.2d 1219, 1226 (5th Cir. 1987). The district court held, however, that the Texas Antitrust Act was not applicable on the facts. The district court interpreted the Texas Act not to apply to actions that are wholly interstate in nature, and it found that WCS could not establish a Texas antitrust action because of the wholly interstate, or non-intrastate, nature of the federal government's waste disposal market. Although not expressly saying so, the district court's order clearly hinted that WCS's only possible claim was a federal one. Indeed, in a footnote, the order states that it "does not address the merits of the Plaintiff's federal antitrust claim," although WCS had not alleged that cause of action. Based on this conclusion that a federal claim effectively had been alleged, the court decided that it had subject matter jurisdiction.

The district court's decision regarding the viability of WCS's allegations appears to have been one the district court had no jurisdiction to make. Without complete preemption, the artful pleading doctrine does not apply. If this was once a matter of debate, the Supreme Court recently has put the issue to rest. *See Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 118 S.Ct. 921, 925 (1998) ("The artful pleading doctrine allows removal where federal law completely preempts a plaintiff's state-law claim. . . . Although federal preemption is ordinarily a defense, once an area of state law has been completely considered, any claim purportedly based on that pre-empted state law claim is considered, from its inception, a

federal claim, and therefore arises under federal law.") (citations and internal quotation marks omitted). *See also Caterpillar, Inc. v. Williams*, 482 U.S. 386, 397 n.11 (1987) ("Although 'occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization, most [courts] correctly confine this practice to areas of the law pre-empted by federal substantive law.") (quoting *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 410 (1981) (Brennan, J., dissenting)). Indeed, even prior to *Rivet*, this was the rule in this circuit and others. *See Avitts v. Amoco Prod. Co.*, 53 F.3d 690, 693 (5th Cir. 1995) ("[W]hen both federal and state remedies are available, plaintiff's election to proceed exclusively under state law does not give rise to federal jurisdiction. In the present case, there is no doubt that Appellees have chosen to pursue only state law causes of action. . . . The district court had no jurisdiction over the subject matter . . . ."). *See also* James W. Moore, MOORE'S FEDERAL PRACTICE § 107.14[3] [b] [iv], p. 107.86.2-86.3 & n.184.1 (3d ed. 1999) (citing cases from the Third, Eighth, and Ninth Circuits, but noting some authority to the contrary).

The district court's error, perhaps, lies in overreliance on *Carpenter, supra*, 44 F.3d 362. The district court's adoption of language in *Carpenter* to support its holding that the artful pleading doctrine could apply irrespective of the lack of complete preemption does not take into account the full reach of the case's language or holding. For instance, the district court focused on a statement in *Carpenter* that, "[t]he artful pleading doctrine recognizes that the characterization of a federal claim as a state claim will not in all cases prohibit removal when the plaintiff has no state claim at all." *Id.* at 367. That quote must be read in context. First, *Carpenter* expressly stated:

> In certain situations where the plaintiff necessarily has available no legitimate or viable state cause of action,

> but only a federal claim, he may not avoid removal by artfully casting his federal suit as one arising. exclusively under state law. Although a defense, preemption may so forcibly *and completely* displace state law that the plaintiff's cause of action is either wholly federal or nothing at all.

Id. at 366 (emphasis added) (citing *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists*, 390 U.S. 557, 559 (1968)). Indeed, the district court did not note the next sentence and citation.

> The doctrine does not convert legitimate state claims into federal ones, but rather reveals the suit's necessary federal character. *See Franchise Tax Board* [*v. Construction Laborers Vacation Trust*], 463 U.S. [1,] 23 [(1983)] (announcing that this exception to the well-pleaded complaint rule "stands for the proposition that if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law.").

Carpenter specifically noted that the artful pleading doctrine is a "narrow exception," *id.* at 367, to the well-pleaded complaint rule, and that "[t]he Supreme Court has required that the preemption be complete." *Id.* at n.2 (citations omitted). Finally, *Carpenter* observed that "the Supreme Court has clearly sanctioned the [artful pleading] rule only in the area of federal labor relations and the Employee Retirement Income Security Act of 1974. . . ." *Id.*

In this circumstance, WCS remained the master of its complaint. *See Avitts*, 53 F.3d at 693. Although WCS *could* have alleged a federal cause of action in its state petition, it did not. It filed a complaint in state court alleging wholly state claims in a non-preempted field. Its choice is entitled to respect and precluded removing the case to federal court absent circumstances not presented here. For certain, we

express no opinion as to the viability of WCS's state law claims. That is for a Texas court to decide. The district court's order, issued without jurisdiction, can have no preclusive effect.

III

Despite improper removal and the district court's error in denying WCS's motion to remand, we must nevertheless confront whether WCS's decision to amend its complaint in federal court to state a claim under the Sherman Act waived this jurisdictional defect.

Jurisdictional defects at time of removal notwithstanding, a final judgment of a federal court may be binding even though the case has been improperly removed, if jurisdiction exists at the time judgment is entered. *See Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 73 (1996) ("[E]rroneous removal need not cause the destruction of a final judgment, if the requirements of federal subject-matter jurisdiction are met at the time the judgment is entered."); *Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 702 (1972); *Kidd v. Southwest Airlines, Co.*, 891 F.2d 540, 547 (5th Cir. 1990).

To be binding despite improper removal, the plaintiff must voluntarily amend its complaint, and there must be a final judgment on the merits. *See Kidd*, 891 F.2d at 546. According to *Kidd*:

> Where the disgruntled party takes full advantage of the federal forum and then objects to removal only after losing at the district court level, that party has waived all objections to removal jurisdiction. Although Kidd initially protested the district court's removal jurisdiction, we find that Kidd's voluntary decision to amend her complaint after the district court denied her motion for remand waived this objection.

Id. (citations omitted). We must decide whether *Kidd* controls our decision today.

Post-*Kidd*, the Supreme Court has looked favorably upon a

plaintiff's argument that diligent objection renders the waiver doctrine inapplicable. *See Caterpillar*, 519 U.S. at 72-77. The *Caterpillar* Court expressly distinguished *Grubbs, supra*, 405 U.S. at 702, on the basis that it addressed jurisdiction after removal without objection. "The [*Grubbs*] decision is not dispositive of the question whether a plaintiff, who timely objects to removal, may later successfully challenge an adverse judgment on the ground that the removal did not comply with statutory prescriptions." *Caterpillar*, 519 U.S. at 73. The Court noted that the plaintiff, "by timely moving for remand, did all that was required to preserve his objection to removal," *id.* at 74, and held that a plaintiff in this predicament need not seek permission for a 28 U.S.C. § 1292(b) interlocutory appeal in order to preserve the error. *Id.* Despite this favorable language, the Court ultimately upheld the federal court judgment on the basis that "[o]nce a diversity case has been tried in federal court . . . considerations of finality, efficiency, and economy become overwhelming." *Id.* at 75.[2] Thus, *Caterpillar* holds that timely objection can preserve the jurisdictional claim despite subsequent amendment, even if other considerations may ultimately outweigh that objection. *See also Hurt v. Dow Chem. Co.*, 963 F.2d 1142, 1145-46 (8th Cir. 1992) (distinguishing *Grubbs* on the basis that plaintiff failed to object to removal); *Paxton v. Weaver*, 553 F.2d 936, 941-42 (5th Cir. 1977). Because *Grubbs* holds that it is only the non-objecting plaintiff who definitively waives its jurisdictional

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[2] The Court further stressed that " [t]o wipe out the adjudication post-judgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice." *Id.* at 77. Here, that concern arguably is not implicated. A diversity case differs fundamentally from a federal question case. With a diversity case, a federal court applies state law exactly as would a state court. *See e.g., Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). There is no difference in the treatment of the substance of plaintiff's claims; the change is largely procedural if at all.

argument, *Grubbs* is not applicable.

We also think that there has been no waiver here for at least one other reason. Applying the *Kidd* elements, in deciding that waiver is not applicable to WCS, we are greatly influenced because there was no trial on the merits.[3] Though

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[3] WCS also objects that its amendment was not voluntary, citing *Humphrey v. Seguentia, Inc.*, 58 F.3d 1238 (8th Cir. 1995), a case in which the district court had found the plaintiff's state law claim to be preempted. "Thus, the district court presented [the plaintiff] with a Hobson's choice. Under the circumstances, his options were to amend his complaint to allege the federal LMRA claims or risk dismissal of the complaint and, consequently, preclusion of his federal claims under the doctrine of res judicata." *Id.* at 1241. We note that a similar Hobson's choice argument has not been uniformly accepted. In *Bernstein v. Lind-Waldock Co.*, 738 F.2d 179, 185 (7th Cir. 1984), Judge Posner persuasively wrote:

> [A]fter Bernstein's motion to remand was denied, he threw in the towel, as it were, and filed an amended complaint in federal court that included an unmistakable federal cause of action against the Exchange. The amended complaint was thus within the original jurisdiction of the federal district courts and it makes no difference that it was filed only because Bernstein's previous suit had improperly been removed. If he was convinced that the original action was not removable he could have stuck by his guns and we would have vindicated his position on appeal. But once he decided to take advantage of his involuntary presence in federal court to add a federal claim to his complaint he was bound to remain there. Otherwise he would be in a position where if he won his case on the merits in federal court he could claim to have raised the federal question in his amended complaint voluntarily, and if lost he could claim to have raised it involuntarily and to be entitled to start over in state court. He 'cannot be permitted to invoke the jurisdiction of the federal court, and then disclaim it when he loses.'

(Citing *Brough v. United Steelworkers of America*, 437 F.2d 748, 750 (1st Cir. 1971)). In *Sigmon, supra*, 110 F.3d at 1202-03, we cited this language favorably but without discussion. *Bernstein*, though not *Sigmon*, precedes, *Caterpillar's* apparent approval of the plaintiff's effort to do "all that was required to preserve his objection to removal." 519 U.S. at 74. As we have noted, *Caterpillar* preserves for appeal objection to jurisdiction if timely objected to in the first place, and in the absence of other equitable

the reach of the expression "trial on the merits" is unclear in this context, we hold that it stops short of a Rule 12 (b)(6) dismissal. Although we have defined this phrase to include summary judgments, *see Kidd*, 891 F.2d at 546; *Sigmon v. Southwest Airlines Co.*, 110 F.3d 1200, 1202 n.6 (5th Cir. 1996), we have not gone further than that. On the same question, sister circuits have expressly held that a "trial on the merits" does not include 12(b)(6) dismissals. *See e.g., Chivas Products, Ltd. v. Owen*, 864 F.2d 1280, 1286-87 (6th Cir. 1988) (citing cases from the Fourth, Fifth, Ninth, and Eleventh Circuits), *rev'd on other grounds, Tafflin v. Levitt*, 493 U.S. 455 (1990). In *Kidd*, we stated that "the 'trial on the merits' requirement comprehends a full bench or jury trial, as well as a summary judgment dismissal." 891 F.2d at 546 (citation omitted). This statement is in accord with the usual rule. *See e.g., Bennett v. Pippin*, 74 F.3d 578, 585 (5th Cir. 1996) (differentiating summary judgments with Rule 12 (b)(6) motions); Wright & Miller, 5A Federal Practice & Procedure: Civil 2d § 1356 (West 1990) ("The purpose of a motion under Rule 12 (b)(6) is to test the formal sufficiency of the statement of the claim; it is not a procedure for resolving a contest about the facts or the merits of the case."). To be sure, the usual course of action upon granting a defendant's Rule 12 (b)(6) motion is to allow a plaintiff to amend his or her complaint, *see Foman v. Davis*, 371 U.S. 178, 182 (1962), which implies that a plaintiff often may still be able to state a claim if pleaded properly. Without any factual review as applied to the plaintiff's allegations, the "merits" of a plaintiff's case have not been sufficiently addressed for purposes of this issue.

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issues. More important, despite its obvious attraction, Judge Posner's language must admit some exception. If it were the firm and fast rule, an amendment of one's complaint after improper removal would always constitute waiver of the argument despite the prerequisite for a judgment on the merits.

One final consideration that influences our decision (which may be said to stem from the fact that there was no judgment on the merits), is the absence here of the "[overwhelming] considerations of finality, efficiency, and economy," which was compelling for the Court in *Caterpillar*. 519 U.S. at 75. This case consumed, relatively, a minimum of judicial resources. No hearing was ever held in this matter. In comparison to the three and one-half years of litigation and six-day jury trial in *Caterpillar*,[4] the district court, in perhaps the overstated words of WCS, granted it, "only eleven days and ten pages to reply to Envirocare's Motion to Dismiss," before it ruled. The few months during which this case improperly resided in federal district court are not comparably overwhelming.

In sum, the doctrine of waiver after improper removal is not applicable on these facts. As WCS timely objected to removal, it has not waived its objection to that removal despite its subsequent amendment of its claim.[5]

IV

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[4] *Caterpillar's* finding of finality, efficiency, and economy considerations was made by analogy to *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989), a diversity case in which the "Court stated that "requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention." *Id.* at 836. An apparently expedited Rule 12 (b)(6) decision hardly is of the same magnitude to either case.

[5] We also find merit in WCS's position of the narrowness of its amendment. The company filed an amended complaint to state the one and only claim the district court suggested it had, and a claim that was consistent with its state court pleading. In comparison, in *Kidd*, the plaintiff brought a breach of her employment contract claim in state court. Upon removal to federal court and denial of her motion to remand, plaintiff "amended her complaint to assert breaches of Southwest's employee stock ownership plan and employee profit-sharing plan" under ERISA. 891 F.2d at 542. Thus, the plaintiff added an entirely new cause of action. Such an action speaks to a studied decision to take advantage of the forum once there.

"An order remanding [an improperly removed] case may require payment of just costs and any actual expenses, including attorney fees, incurred as the result of the removal." 28 U.S.C. § 1447(c). Appellant's costs and expenses before this court and the district court were certainly "incurred as the result of the removal." *See Avitts v. Amoco Prod. Co.*, 111 F.3d 30, 32 (5th Cir. 1997). "[O]rdinary litigation expenses that would have been incurred had the action remained in state court are not recoverable. . . ." *Id.* at 32. Moreover, an award of attorney's fees under § 1447(c) for the plaintiff who plays an "active role . . . in persuading the district court to retain jurisdiction" is inappropriate. *Id.* at 33. In this case, however, WCS may be said to have taken an opposite position with respect to jurisdiction, despite its amendment. Furthermore, we are persuaded that WCS's attorney's fees in the district court would not have been incurred had the action remained in state court. After all, the litigation expense incurred in federal court involved efforts to remand the case to state court and, failing that, WCS amendment of its pleadings to state a federal cause of action and subsequent defense of that position against Envirocare's motion to dismiss. It appears to us that WCS would not have incurred these fees if Envirocare had not improperly removed the case. We therefore conclude that WCS is entitled under the statute to the full costs and expenses, including attorney's fees, incurred in defending against the improper removal and all other action in district court.

V

In sum, we hold that this action was improperly removed to district court and that WCS's motion to remand should have been granted. Furthermore, on the facts of this case, WCS did not waive its jurisdictional argument by amending its complaint in the district court to state a federal cause of action under the Sherman Act. WCS's antitrust cause of action may or may not be able to escape dismissal in state court, but that is not for a federal court to decide.

This district court lacked subject matter jurisdiction over this action. Its orders are therefore VACATED, and the case is REMANDED to the district court with instructions to remand this action to the state court from which it was removed in accordance with 28 U.S.C. § 1447(c) and to award costs and fees to WCS upon submission of proper proof.

VACATED and REMANDED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

MO-98-CA-62

WASTE CONTROL SPECIALISTS, LLC,
Plaintiff,

v.

ENVIROCARE OF TEXAS, INC.; ENVIROCARE OF UTAH, INC.; KHOSROW B. SEMNANI; CHARLES A. JUDD; FRANK C. THORLEY; BILLY W. CLAYTON; AND NANCY M. MOLLEDA,
Defendants.

ORDER

BEFORE THE COURT, in the above-captioned cause of action, are Defendants' Motion to Dismiss, filed April 20, 1998; Plaintiff's Response to Defendants' Motion to Dismiss, filed May 1, 1998; Defendants' Reply to Plaintiff's Response to Defendants' Motion to Dismiss, filed May 8, 1998; Defendants' Supplemental Memorandum, filed May 20, 1998; Plaintiff's Response to Defendants' Letter Brief, filed May 21, 1998; and Plaintiff's Letter Brief, filed July 8,1998. To fully consider the Defendants' Motion to Dismiss, the Court has also considered the briefs filed regarding Plaintiff's Second Amended Complaint, filed July 20, 1998.[1] After due consideration, the Court is of the opinion that the following Order is appropriate.

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[1] The Plaintiff filed its Motion for Leave of Court to File Plaintiff's Second Amended Complaint on June 29, 1998. Defendants filed a brief in Opposition to Plaintiff's Motion for Leave of Court to File Plaintiff's Second Amended Complaint on July 7, 1998 and Plaintiff filed its Response to Defendants' Opposition to Plaintiff's Motion for Leave to File Plaintiff's Second Amended complaint on July 10, 1998. The court's Order of July 20, 1998, granted Plaintiff's Motion for Leave to file Second Amended Complaint.

I. STANDARD OF REVIEW

When reviewing a motion to dismiss for failure to state a claim, the Court may only grant the motion if "it appears beyond doubt that the plaintiffs would not be entitled to recover under any set of facts that they could prove in support of their claim." *Crowe v. Henry,* 43 F.3d 198, 203 (5th Cir.1995) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Defendants in Rule 12(b)(6) motions "admit[] the facts alleged in the complaint, but challenge[] plaintiff's right to relief based upon those facts." *Id.* (quoting *Ward v. Hudnell*, 366 F.2d 247, 249 (5th Cir. 1966)). Therefore this Court accepts as true all factual allegations in the pleadings. *Kansa Reinsurance Co. v. Congressional Mortg. Corp.*, 20 F.3d 1362, 1366 (5th Cir. 1994). The Court need not resolve unclear questions of law in favor of the plaintiff. *Id.* Moreover, a successful affirmative defense may also merit dismissal under Rule 12(b)(6). And finally, in order to avoid dismissal, the plaintiff must plead specific facts—not merely conclusory allegations. *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1062 (5th Cir. 1994).

II. BACKGROUND

The Plaintiff Waste Control Specialists, LLC ("WCS"), brings the present cause of action against the Defendants Envirocare of Utah, Inc.; Envirocare of Texas, Inc.; Khosrow B. Semnani; Charles A. Judd; and Frank C. Thorley (collectively, "Envirocare"), alleging that the Defendants [2] intentionally interfered with WCS's attempts to obtain lucrative government contracts for the disposal of the Department of Energy's ("DOE") low-level radioactive and

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[2] Plaintiff's Second Amended Complaint, filed July 20, 1998, dismissed Defendants Billy W. Clayton and Nancy M. Molleda from the present cause of action.

mixed wastes.[3] WCS's Second Amended Complaint alleges causes of action (1) for monopolization and attempted monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2; (2) tortious interference with prospective business relations; (3) business defamation; and (4) business disparagement. Taking WCS's factual allegations as true, however, the Defendants claim that WCS has failed to state a cause of action for which relief may be granted and request that the Court dismiss the Plaintiff's case.

A. The DOE Private Disposal Market

At the heart of the instant case are the waste of past days. Plaintiffs Second Amended Complaint sets forth that the DOE oversees the monumental task of disposing radioactive wastes generated by the DOE and its predecessor agencies like the Atomic Energy Commission. *Pl.'s Second Am.*

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[3] Plaintiff's Second Amended Complaint defines low-level radioactive and mixed wastes in the following way:

> DOE 'low-level radioactive waste,' as that term is used in this dispute, includes items that contain or have become contaminated with certain radioactive elements. These elements consist of uranium or thorium as well as other radioactive elements created in nuclear reactions. This waste typically includes such things as contaminated soil, clothing, filters, debris, equipment and tools, as well as tailings from DOE's uranium mining and milling operations, and, in addition, the uranium and thorium-contaminated materials of DOE.

Pl's Second Am. Compl. at ¶16. *See also* 42 U.S.C. §2021b(9) (1994) (defining "low-level radioactive wastes").

> DOE 'mixed waste' . . . . is DOE low-level radioactive waste that also contains 'hazardous' components (as defined by the federal Resource Conservation and Recovery Act) or 'toxic' components (as defined by the federal Toxic Substances Control Act). Approximately 98 percent of all the mixed waste in the U.S. has been generated by DOE.

Pl's Second Am. Compl. at ¶ 17.

Compl. at ¶¶ 13-14. Apparently, the DOE must dispose of nearly one billion cubic feet of low-level radioactive and mixed wastes at taxpayer cost in the tens of billions of dollars. *Id.* Although the DOE maintains its own facilities to dispose of some of the wastes, the DOE has also begun to grant private contracts to disposal facilities that are off-site from where such wastes were generated. *Id.* ¶¶ 19-23.

Since February of 1997, WCS has run a facility in Andrews County, Texas, to store, treat, and dispose of various hazardous and toxic wastes. *Id.* at ¶ 24. The facility operates under license granted by the Texas Natural Resource Conservation Commission (the "TNRCC") and by the United States Environmental Protection Agency. *Id.* at ¶¶ 26-28. Meanwhile, the Defendant Envirocare of Utah, Inc.'s facility, located in Tooele County, Utah, is the only privately-run waste disposal facility in the United States which receives, stores, treats, and disposes of low-level radioactive and mixed wastes from the DOE. *Id.* at ¶¶ 43-45. Defendant Envirocare of Texas, Inc., on the other hand, is an affiliate of the Utah company and has its principal place of business in Andrews County. *Id.* at ¶ 6. Finally, Defendants Khosrow B. Senmani, Charles A. Judd, and Frank C. Thorley are, or have been, officers and owners of Envirocare of Utah, Inc., and Envirocare of Texas, Inc.[4] *Id.* at ¶¶ 7-10.

With an eye towards an obvious potential for profit, WCS beginning around 1995 sought to enter the two relevant

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[4] Defendant Khosrow B. Semnani is the sole owner of Envirocare of Utah, Inc., has been Envirocare's President, and is the president and majority owner of Envirocare of Texas, Inc. Defendant Charles A. Judd has been the Executive Vice President of Envirocare of Utah, Inc., has been President of Envirocare of Utah since May 14, 1997, and is also the Executive Vice President and minority owner of Envirocare of Texas, Inc. Finally, Defendant Frank C. Thorley has been the Regulatory Affairs Manager of Envirocare of Utah and Envirocare of Texas.

markets (the "DOE disposal market") now the subject of the present suit and in which the Envirocare of Utah facility already participates: "(1) the private disposal market for DOE's mixed radioactive waste that must be disposed of off-site; and (2) the private disposal market for DOE's low-level radioactive waste that must be disposed of off-site." *Id.* at ¶ 12. Moreover, WCS points out that the relevant geographic market for disposal of such wastes was "the entire continental United States." *Id.*

B. The WCS Proposal

To enter the highly regulated DOE disposal market, WCS recognized that only "[a]uthorization by DOE to receive DOE low-level radioactive and mixed wastes for disposal would result in WCS' entry into the product market for those wastes." *Id.* ¶ 30. Thus, WCS developed a three-part plan which involved obtaining necessary permits or authorizations from the DOE, the TNRCC, and the Texas Department of Health ("TDH"):

> *First*, from TNRCC, WCS needed permission to amend its Andrews County Facility hazardous waste permit so that the permit would not preclude the receipt of radioactive materials at the facility. TNRCC regulates amendments to hazardous waste disposal permits within the State of Texas. WCS filed the requisite amendment request with TNRCC in March 1996, and that request was granted by TNRCC on July 10, 1996. (*Pl.'s Second Am. Compl.* at ¶ 32)
>
> *Second*, from the [TDH], WCS needed a permit to store and treat low-level radioactive wastes at the Andrews County Facility. TDH regulates the storage and treatment of low-level radioactive wastes within the State of Texas. WCS filed the requisite permit application with TDH in March 1996, and, after months of delay and interference caused by Envirocare and its agents, that permit was granted on November 3, 1997.

(*Id.* at ¶ 33)

Third, WCS needed DOE's authorization to be allowed to compete to receive for disposal DOE's low-level radioactive and mixed wastes. DOE has legal authority over the disposal of its own low-level radioactive and mixed wastes, and can legally authorize WCS for such disposal. WCS began discussions with DOE officials in this regard in late 1995 and continuing into 1996. WCS also began preparing a detailed technical document demonstrating that the Andrews County Facility is geologically safe and environmentally sound for the disposal of low-level radioactive and mixed wastes. (*Id.* at ¶ 34)

The third part of WCS's plan was particularly crucial because WCS realized that "Texas law contains no provisions authorizing licensing by Texas [agencies] of a disposal facility dedicated to the disposal of DOE low-level radioactive and mixed waste." *Id.* at ¶ 35. Thus, in discussions with DOE officials, WCS suggested that the DOE could authorize WCS's disposal of DOE's wastes and utilize the TNRCC to oversee WCS's operations. *Id.* at ¶¶ 36-38. Moreover, in discussions with the TNRCC beginning in the spring and early summer of 1996, TNRCC officials apparently expressed interest in WCS's plans to enter the DOE disposal market. *Id.* at ¶¶ 40-42.

C. The Best Laid Plans . . .

WCS's plans fell through, however, when TNRCC officials eventually withdrew from WCS's oversight plan. *Id.* at ¶ 78. Because of the TNRCC's apparent unwillingness to oversee WCS's disposal facility for low-level radioactive and mixed wastes, the DOE was also "unwilling to proceed to authorize the WCS site for disposal services in the relevant product markets absent TNRCC's participation." *Id.* at ¶ 80.

Consequently, WCS lost the opportunity to compete for various DOE disposal contracts valued in the tens and hundreds of millions of dollars and in fact has estimated that it has lost a "net present value . . . of expected market share in the relevant product markets over the next several years . . . exceed[ing] one billion dollars." *Id.* at ¶¶ 86, 81-84, 134, 138.

In the present cause of action, however, WCS essentially claims that its failure to enter the DOE disposal market was not its fault, and blames the Defendants for the DOE's ultimate unwillingness to authorize WCS for the disposal of its wastes. According to WCS, the Defendants improperly influenced state and federal officials into locking WCS out of the relevant DOE disposal markets. Thus, WCS alleges that the "TNRCC's withdrawal was the proximate result of the illegal actions, misrepresentations, predatory practices, interference, and abuse of monopoly power by Defendants complained of above." *Id.* at ¶ 79.[5]

Specifically, WCS alleges that the Defendants (1) presented false and misleading claims of technical defects and

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[5] Plaintiff also sets forth allegations that the Defendants illegally acquired and illegally maintained their present monopoly over the DOE's waste disposal market. *Id.* at ¶¶ 51-60. However, Plaintiff's allegations in those sections of the Complaint are essentially irrelevant to the Plaintiff's claims against the Defendants because they do not address Defendants' alleged interference with the Plaintiff's present plans to compete in DOE's disposal market. For example, the allegations merely point out that the Defendants bribed *Utah officials* to obtain and maintain their facilities *in Utah* without pointing out how such an action interfered with WCS's present attempts to enter the DOE market by obtaining licenses *in Texas*. *See Id.* at ¶ 54. Moreover, the allegations set forth that the Defendants have falsely advertised the superiority of their disposal services without connecting such misrepresentation to Plaintiff's current attempts to enter the DOE market. *Id.* at ¶ 60. To the extent that the factual allegations in paragraphs 51-60 of the Second Amended Complaint may involve direct interference with the Plaintiff's market entry, however, the Court will consider them.

legal issues to federal and state officials, (2) created environmental groups to push forward bogus technical or environmental concerns, (3) threatened to open up a competing disposal site in close proximity to WCS to create the illusion that Texas was to become a "dumping ground" for nuclear wastes, and (4) threatened to deprive competitors or customers the use of Envirocare's "essential facility" in Utah for their disposal needs or financial assurances requirements. *Id.* at ¶ 62. WCS claims that the Defendants used Texas lobbyists to present false or misleading information about the technical and geological adequacy of the WCS-Andrews site and the impact of WCS's proposal on water resources in West Texas. *Id.* at ¶¶ 63-65, 69. WCS contends that the Defendants' statements were "calculated to incite fears among key government officials that the State of Texas would become a 'dumping ground' for radioactive waste if the authorizations sought by WCS were granted." *Id.* at ¶ 65. Furthermore, WCS notes that "[t]he goal of such actions by Defendants was to prompt withdrawal of TNRCC and DOE support for the authorizations required by WCS to enter the relevant product markets." *Id.* Indeed, WCS alleges that the Defendants' "false or misleading statements were taken seriously by the government officials to whom they were directed." *Id.* at ¶ 70.

WCS also alleges that the Defendants made a "sham" license application to operate a competing low-level radioactive disposal site in Andrews, Texas. *Id.* at ¶ 71. WCS points out that Defendant Envirocare of Texas's application was far inferior to WCS's own application and that it was made merely to give the "false illusion" [6] that Texas was going to become a dumping ground for radioactive wastes. *Id.* at ¶¶ 71-77. Because the sham application was inadequate,

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[6] The Court will assume that Plaintiff does not really allege that the Defendants created a *false* illusion, but merely an illusion or a false impression.

WCS alleges that the TNRCC denied Envirocare's application and then withdrew its support for WCS's oversight plan with the DOE. *Id.* at ¶¶ 77-80. Consequently, the DOE withdrew consideration of WCS for its disposal needs. *Id.* at ¶ 80. WCS states that "TNRCC's withdrawal, coupled with other direct interference by Envirocare at DOE" has caused WCS to lose (1) a $350 million contract for disposal of wastes at the DOE's Fernald, Ohio, Field Office; (2) a $10-100 million contract with the U.S. Army Corps of Engineers; and (3) a lost future share of the relevant markets for DOE wastes with a net present value of $1 billion. *Id.* at ¶¶ 81-86.

WCS also claims that the Defendants' lobbyists improperly delayed WCS's application with the TDH to obtain a permit to store radioactive wastes in Andrews County. *Id.* at ¶ 87. Under TDH's financial assurances requirements, WCS was apparently "forced to specify use of Envirocare's 'essential facility.' " *Id.* at ¶ 88. The Defendants, however, argued that "Envirocare had no obligation to receive wastes from WCS [without a contract]." *Id.* at ¶ 89. Moreover, at a August 1997 public hearing, the Defendants "publicly disparaged the regulatory process leading to the TDH staff recommendation, and improperly petitioned TDH with a series of written 'questions' about the WCS permit and the TDH regulatory process." *Id.* at ¶ 91. WCS also notes that the Defendants' opposition to WCS's plans was inconsistent with the Defendants' own application for Envirocare of Texas. *Id.* Finally, however, WCS did receive its TDH permit on November 3, 1997. *Id.* at ¶ 92.

WCS additionally contends that the Defendants "have improperly or illegally colluded with key Department of Energy officials charged with reviewing proposals put to that agency by WCS so as to deprive WCS of a fair and impartial government review of such proposals." *Id.* at ¶ 94. Furthermore, although outside the relevant markets in the

instant case, WCS alleges that the Defendants have "coerce[d] prospective WCS customers into disposing of their ancillary waste streams at Envirocare's Utah facility . . . [by] threaten[ing] prospective WCS clients with termination of Envirocare's current radioactive waste disposal services or with the refusal of Envirocare to take ancillary waste streams that can only be disposed of at Envirocare's site, if the customer uses WCS for *any* waste storage, treatment, or disposal services." *Id.* at ¶ 96 (Pl.'s emphasis). According to WCS, this customer interference has also prevented WCS from entering DOE's disposal market "by depriving WCS of customers needed to sustain the costs of entering the mixed and low-level radioactive waste disposal markets." *Id.* at ¶¶ 99-100.

Therefore, WCS's claims for (1) monopolization and attempted monopolization under Section 2 of the Sherman Act, 15 U.S.C. §2; (2) tortious interference with prospective business relations; (3) business defamation; and (4) business disparagement are all ultimately based on WCS's failure to enter the DOE's waste disposal market. Consequently, for each claim, WCS alleges damages for $1 billion of lost market share and more than $450 million for lost contracts with the DOE. *Id.* at ¶¶ 109, 114, 118, 122, 129, 134. Furthermore, WCS requests trebled damages for its antitrust claims, punitive or exemplary damages, and injunctive relief against the Defendants. *Id.* at 50-51. WCS claims that each time the DOE offers a contract to dispose of its wastes, "WCS will lose an opportunity (often a multi-year opportunity) to offer DOE its disposal services." *Id.* at ¶ 103. The Court now turns to those specific allegations and the Defendants assertions that the Plaintiff's claims are unavailing.

III. DISCUSSION

Because the Defendants' attempts to influence the policy decisions of two government agencies, the DOE and the TNRCC, are at the core of the Plaintiff's case, the Defendants

contend that the *Noerr-Pennington* doctrine shields their actions from Plaintiff's claims.

A. The Noerr-Pennington Doctrine

Section 2 of the Sherman Act at 15 U.S.C. § 2 provides a cause of action for monopolization and attempted monopolization:

> Every person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . .

15 U.S.C. § 2 (1997); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993). However, beginning with *Eastern R.R. Presidents Conference v. Noerr Motor Freigh, Inc.* 65 U.S. 127 (1961), the U.S. Supreme Court established "that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Id.* at 136. Then, in *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965), the Court re-emphasized that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." *Id.* at 670. Finally, in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), the Court extended the *Noerr-Pennington* doctrine to "the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and the arms of the executive) and to courts, the third branch of government." *Id.* at 510.

Recognizing that valid government activity will often negatively impact economic competition, the *Noerr-Pennington* doctrine is deeply rooted both in the need to protect the legitimacy of government processes and to protect the First Amendment right to petition the government. For example, the Court has observed that "where a restraint upon trade or monopolization is the result of valid governmental

action, as opposed to private action, no violation of the [Sherman] Act can be made out . . . . [because] under our form of government *the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of governinent so long as the law itself does not violate some provision of the Constitution.*" *Noerr*, 365 U.S. at 136 (emphasis added). To hold otherwise "would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade." *Id.* at 137. Moreover, as would also be the case with legislative and executive processes, "it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-à-vis* their competitors." *California Motor Transport Co.*, 404 U.S. at 510-11.

B. The "Sham" Exception

Even as the Supreme Court was establishing the *Noerr-Pennington* doctrine, it was also establishing that "there may be instances where the alleged [antitrust] conspiracy 'is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." *Id.* at 511 (quoting *Noerr*, 365 U.S. at 144). As developed by the Court, the scope of the "sham" exception will vary according to "the source, context, and nature of the anticompetitive restraint at issue." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988). Not until *Professional Real Estate Investors Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), however, did the Supreme Court end much of the ambiguity[7] surrounding

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[7] *See* James B. Perrine, Commentary, *Defining the "Sham Litigation" Exception to the Noerr-Pennington Antitrust Immunity Doctrine: An*

sham litigation by setting forth a two-part "objective-then-subjective" test to determine whether litigation was a "sham" unworthy of *Noerr-Pennington* immunity:

> First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals an attempt to interfere *directly* with the business relationships of a competitor through the use of the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon.

Id. at 60-61 (internal quotation marks and citations omitted). Thus, the plaintiff must "disprove the challenged lawsuit's *legal* viability before the court will entertain evidence of the suit's *economic* viability." *Id.* at 61.

For plaintiffs, overcoming the objective prong of the *Professional Real Estate Investors* test is a difficult task. The plaintiff must prove that the defendant's "pursuit of claims [was] so baseless that no reasonable litigant could realistically expect to secure favorable relief." *Id.* at 62. Thus, to retain *Noerr-Pennington* immunity, the defendant need merely show that it had "probable cause" to institute legal

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Analysis of the Professional Real Estate Investors v. Columbia Pictures Industries Decision, 46 ALA. L. REV. 815 (1995) (describing ambiguity surrounding *Noerr* doctrine before the *Professional Real Estate* decision which established a threshold "objective" test for determining whether litigation was a sham).

proceedings regardless of the defendant's intent. *Id.* at 63 ("[E]vidence of anti-competitive intent cannot affect the objective prong of *Noerr*'s sham exception.").

1. Successful Actions

A reasonable act, however, is proven where the petitioner of government action is successful. In *Professional Real Estate Investors*, the Supreme Court noted that "we have explicitly observed that a successful 'effort to influence governmental action . . . certainly cannot be characterized as a sham.' " *Id.* at 58 (quoting *Allied Tube & Conduit Corp.*, 486 U.S. at 502). Therefore, "[a] winning lawsuit is by definition a reasonable effort at petitioning for redress and . . . not a sham." *Id.* at 60 n.5; *Fox News Network, LLC v. Time Warner Inc.*, 962 F.Supp. 339, 345 (E.D.N.Y. 1997) ("[A] successful effort to influence governmental action cannot be considered a sham.).[8] In the legislative context, the Court in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), observed that a private industry group's attempts to influence state and local governments through publication of a "Code" establishing performance requirements for the design and installation of electrical wiring systems "cannot by characterized as a sham given the actual adoption of the 1981 Code into a number of statutes and local ordinances." *Id.* at 502.

Indeed, in *USS-Posco Industries v. Contra Costa County Bldg. & Constr. Trades Council, AFL-CIO*, 31 F.3d 800 (9th

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[8] The Court warned also that "when the antitrust defendant has lost the underlying litigation, a court must 'resist the understandable temptation to engage in *post hoc* reasoning by concluding' that an ultimately unsuccessful 'action must have been unreasonable or without foundation.' " *Professional Real Estate Investors*, 508 U.S. at 60 n.5 (quoting *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22 (1978)); *see also Hartford Life Ins. Co. v. Variable Annuity Life Ins. Co.*, 964 F.Supp. 624, 628 (D.Conn. 1997) (losing lawsuit does not mean that defendant had no probable cause to instigate reasonable litigation).

Cir. 1994), the Ninth Circuit Court of Appeals held that the defendant union's twenty-nine separate lawsuits against the plaintiffs could not be considered a sham where "fifteen of the twenty-nine lawsuits alleged by [one of the plaintiffs] as part of the pattern of filings 'without regard to the merits' have proven successful." *Id.* at 811. The appellant court reasoned that "[t]he fact that more than half of all the actions as to which we know the results turn out to have merit cannot be reconciled with the charge that the unions were filing lawsuits and other actions willy-nilly without regard to success." *Id.; see also In Re Circuit Breaker Litigation*, 984 F.Supp. 1267, 1274 (C.D.Cal. 1997) ("[T]he Court also finds that Plaintiff's success thus far in this litigation indicates that the lawsuits are not 'objectively baseless,' which precludes a finding that *In re Circuit Breaker Litigation* constitutes a 'sham' petitioning.").

The Supreme Court's recognition that successful petitioning efforts are not shams further reinforces the principle that the *Noerr-Pennington* doctrine protects the legitimacy of our government processes. *Noerr*, 365 U.S. at 136. Thus, in successful actions "[w]here a restraint upon trade or monopolization is the result of *valid governmental action*, as opposed to private action,' those urging the governmental action enjoy *absolute immunity* from antitrust liability for the anticompetitive restraint." *Allied Tube & Conduit Corp.*, 486 U.S. at 499 (quoting *Noerr*, 365 U.S. at 136) (emphasis added). However, in unsuccessful actions "where, independent of any government action, the anticompetitive restraint results directly from private action, the restraint cannot form the basis for antitrust liability if it is 'incidental' to a *valid effort* to influence governmental action." *Id.* (emphasis added).

In the instant case, all of the Plaintiff's alleged antitrust injuries are squarely the result of the successful petitioning of government action for which the Defendants are generally

entitled to "absolute immunity." *Allied Tube & Conduit Corp.*, 486 U.S. at 499. The Plaintiff's allegations are simply that the Defendants petitioned federal and state officials to not authorize the Plaintiff to enter the DOE's waste disposal market. *See* Background *supra* at 6-7. As the Supreme Court has explicitly noted, successful petitioning activity "is *by definition* a reasonable effort at petitioning for redress and . . . not a sham." *Professional Real Estate Investors*, 508 U.S. at 60 n.5 (emphasis added). On that basis alone, the Plaintiff's antitrust cause of action should be dismissed without inquiry into the federal and state agency decision-making processes.[9] *Noerr*, 365 U.S. at 136 (where restraint on trade caused by valid government action, no violation of Sherman Act possible). However, despite the Supreme Court's explicit observations, this Court is reluctant to summarily dismiss the Plaintiff's cause of action without first examining Plaintiff's allegations challenging the *validity* of the government decisions in this case.

2. Misrepresentations in "Sham" Allegations

The Plaintiff's Second Amended Complaint ("Complaint") further challenges the very *validity* of the government action which the Defendants sought in this case. Essentially, the Plaintiff alleges that the Defendants' petitioning activities invalidated the DOE's and the TNRCC's decisions because the Defendants (1) presented false and misleading claims of technical defects and legal issues to federal and state officials, (2) created environmental groups to push forward bogus technical or environmental concerns, and (3) used a "sham" disposal application with the TNRCC to threaten the opening

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[9] The Court would also forego examining the Plaintiff's other allegations of anti-competitive behavior that fall outside of government petitioning activity because the Plaintiff would not be able to complain of a restraint on trade in a market that it by law had no right in which to compete. *Okefenokee Rural Elec. Membership Corp. v. Florida Power & Light Co.*, 214 F.2d 413, 418 (5th Cir. 1954).

of competing disposal site in close proximity to WCS to create the illusion that Texas was to become a "dumping ground" for nuclear wastes. *Pl's Second Am. Compl.* at ¶ 62. Thus, the Plaintiff complains that the Defendants prevented it from having *meaningful access* to the government officials regulating the DOE's disposal market. *California Motor Transport*, 404 U.S. at 512.

The Supreme Court, unfortunately, has not clearly articulated the role that allegations of deliberate misrepresentation play in the face of successful efforts to influence government actions. Although such allegations challenge the very legitimacy of "successful" petitioning efforts, the Court in *Professional Real Estate Investors* specifically noted that "[w]e need not decide here whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations." *Professional Real Estate Investors*, 508 U.S. at 61 n.6. At most, the courts have recognized that the role of misrepresentations in the "sham" analysis will depend upon whether the petitioning effort is made in (1) a more legislative and "political" setting, or (2) an adjudicative setting. For example, "[a] publicity campaign directed at the general public, seeking legislation or executive action, enjoys antitrust immunity even when the campaign employs *unethical* and *deceptive* methods." *Allied Tube & Conduit Corp*, 486 U.S. at 499-500 (emphasis added). However, "[m]isrepresentations, condoned in the *political* arena, are not immunized when used in the *adjudicatory* process." *California Motor Transport Co.*, 404 U.S. at 513 (emphasis added). Thus, a court examining allegations of misrepresentations before government officials should consider whether the petitioning activity at issue is more a part of the "political arena" than a part of the "adjudicatory process" before concluding that the petitioners caused a "valid governmental action" or were part of a "valid effort to influence governmental action." *See Gen-Probe, Inc. v.*

Amoco Corp., 926 F.Supp. 948, 956 (S.D.Cal. 1996) (*Noerr* immunizes wider range of conduct in the political arena than before an adjudicatory body); *Fischer Sand and Aggregate Co. v. City of Lakeville*, 874 F.Supp. 957, 960 n.4 (D.Minn. 1994) (finding that rezoning and permit proceedings in front of city officials and state agencies were "more legislative and 'political' than judicial in character."). This consideration is important because the court presiding over allegations of "sham" petitioning must essentially review the antitrust action's underlying adjudicatory processes in order to determine whether the defendants' petitioning activities sought "to bar their competitors from *meaningful access* to *adjudicatory* tribunals and the decision-making process." *Brown & Root, Inc. v. Louisiana State AFL-CIO*, 10 F.3d 316, 325 (5th Cir. 1994) (emphasis added).[10]

The line between "political" and adjudicatory processes, however, blurs when considering the actions of government agencies because they are peculiarly "creatures of the legislature, and the arms of the executive." *California Motor Transport*, 404 U.S. at 510. Nevertheless, this Court sees no reason why petitioning efforts in front of agencies or administrative bodies cannot also be clearly more legislative and political than adjudicative in nature. At the heart of the political-versus-adjudicatory-line-drawing appears to be the great deference which courts must give to the policy-oriented and politically-accountable legislature. *See Noerr*, 365 U.S. at 136 (allowing deceptive and unethical campaigns to influence legislature to pass favorable laws and noting "responsibility"

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[10] Of course, the *Noerr-Pennington* doctrine does not protect criminal conduct, such as bribery, in any context. *Federal Prescription Serv., Inc. v. Am. Pharmaceutical Ass'n*, 663 F.2d 253, 263 (D.C.Cir. 1981) ("Attempts to influence governmental action through overtly corrupt conduct, such as bribes (in any context) and misrepresentation (in the adjudicatory process), are not normal and legitimate exercises of the right to petition, and activities of this sort have been held beyond the protection of *Noerr*."), *cert. denied*, 455 U.S. 928 (1982).

of legislative and executive branches to determine the passage of laws "so long as" the laws are constitutional). And, just as courts must defer to the discretionary authority of the legislature, courts also defer to agency policy-making decisions that fall within an agency's discretion as directed by the legislature. *See Louisiana Dep't of Labor v. U.S. Dep't of Labor*, 108 F.3d 614, 618 (5th Cir. 1997) (citing *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-44 (1984)) (Where the intent of Congress is unclear because a statute is ambiguous, courts must defer to merely "reasonable interpretations" made by the agency charged with administering the statute's mandates.), *cert. denied*, 118 S.Ct. 80 (1997). Indeed, as the Fifth Circuit has noted, "where Congress has charged an agency with administering [a] statute, courts must not substitute their judgment for the delegated policymaking role of the agency." *Microcomputer Technology Inst. v. Riley*, 139 F.3d 1044, 1049 (5th Cir. 1998). Furthermore, this delegated policy-making role is clearly more a part of a *political* rather than adjudicatory process because, " '[w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of government to make policy choices.'" *Id.* (quoting *Chevron*, 467 U.S. at 865-66).

To determine the effect of Plaintiff's allegations of misrepresentations in the case at bar, the Court must be especially mindful of the regulatory framework that Congress has established for the disposal of low-level radioactive and mixed wastes. Under the Atomic Energy Act of 1954, Pub.L. No. 102-486, 106 Stat. 2944 (codified as amended at 42 U.S.C. §§ 2011-2297g-4 (1994)), the federal government has the power "to regulate all activities involving radiological health and safety of atomic energy and its byproducts." *Waste Control Specialists, LLC v. U.S. Dep't of Energy*, 141 F.3d 564, 565 (5th Cir. 1998); *see* 42 U.S.C. § 2013 (1994).

Moreover, the federal government is "responsible for the disposal of . . . low-level radioactive waste owned or generated by the Department of Energy." 42 U.S.C. § 2021c(b)(1) (1994). Although the Nuclear Regulatory Commission ("NRC") normally issues licenses for sites to dispose of low-level radioactive wastes, the NRC may also exempt certain activities from licensing such as contractor work for the DOE at a federally owned or controlled site. *Waste Control Specialists*, 141 F.3d at 566 (citing 42 U.S.C. § 2111 (1994) and 10 C.F.R. § 30.12(a) (1997)[11]). By agreement, however, the NRC may relinquish regulatory oversight for the disposal of low-level radioactive wastes to "agreement states" which must consider "the protection of the public health and safety from radiation hazards." 42 U.S.C. 2021(b) (1994). Texas is one such "agreement state," but Texas law does not allow for the licensure of *private* entities like the Plaintiff to dispose of the DOE's low-level radioactive and mixed wastes. *Waste Control Specialists*, 141 F.3d at 566 (citing TEX. HEALTH & SAFETY CODE ANN. § 401.203 (West 1992)).[12] However, as the Plaintiff's Complaint correctly points out, the DOE may itself *choose* to exercise "control" over a Texas private entity and therefore allow that entity to enter the DOE's disposal market. *Id.* at 568.

Therefore, the regulatory framework underlying the instant case provides that the DOE's and the TNRCC's decisions

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[11] 10 C.F.R. § 30.12(a) provides that "any prime contractor" disposing of the DOE's low-level radioactive wastes may be exempt from certain licensing requirements if performing work conducted "for the [DOE] at a United States Government-owned or *controlled* site." 10 C.F.R. § 30.12(a) (1998) (emphasis added).

[12] The Texas legislature has provided that "[a] radioactive waste disposal license may be issued only to public entity specifically authorized by law for radioactive waste disposal." TEX. HEALTH & SAFETY CODE ANN.§ 401-203 (West Supp. 1998).

resulting in the Plaintiff's exclusion from the DOE disposal market were simply exercises of their delegated *policy-making* authority influenced by petitioning in the *political* rather than *adjudicatory* arena. Indeed, this conclusion was abundantly made clear by the Fifth Circuit recently in *Waste Control Specialists, LLC v. U.S. Dep't of Energy*, 141 F.3d 564 (5th Cir. 1998). In that case, the very same Plaintiff in the case at bar also argued that it was qualified to enter the DOE's disposal market and in fact challenged "whether the DOE ha[d] the discretion to require a state license as a requirement for bidding" on the DOE's contracts to dispose of low-level radioactive and mixed wastes. *Id.* at 567. The Plaintiff argued that the DOE's decision to reject the Plaintiff's bid was thus "arbitrary and capricious." *Id.*

The Fifth Circuit, however, disagreed with the Plaintiff and directed the district court to dismiss the Plaintiff's case against the DOE. *Id.* at 568. Specifically, the appellate court recognized that the DOE had the discretion to accept or reject the Plaintiff's application to enter the DOE's disposal market on the condition that the Plaintiff meet certain state licensing requirements:

> If DOE chooses to regulate, or 'control', the private waste disposal sites, then the sites are exempt from NRC and state licensing requirements. Where, however, DOE does not exercise such control, the NRC and the agreement states retain their power to regulate commercial sites providing a service to DOE. Nothing in the [10 C.F.R. § 30.12] statute indicates that DOE must exercise regulatory authority over such sites.

Id. Thus, in that case, the Fifth Circuit rejected the Plaintiff's attempt to litigate its way into the DOE disposal market because "WCS [was] effectively asking the courts to intrude into the agency's policy making process without a statutory basis." *Id.*

Furthermore, the Fifth Circuit decision makes clear that the TNRCC's choice to withdraw as a proposed oversight body on behalf of the DOE was also a policy *consideration* appropriate to the political arena, not the adjudicatory one. *Id.* at 566. As the Plaintiff's Complaint properly points out, Texas law does not allow the TNRCC to grant a license to the Plaintiff to dispose of the DOE's low-level radioactive and mixed wastes because the Plaintiff is not a public entity. *Id.*; *see Pl.'s Second Am. Compl.* at ¶¶ 35-36. Moreover, Texas law certainly does not require that the TNRCC act as an oversight body for the DOE should it choose to gain "control" over a private disposal facility in Texas. *See* TEX. HEALTH & SAFETY CODE ANN. § 401.203 (West 1992). Thus. the TNRCC's election to either agree or not agree with the Plaintiffs oversight proposal with the DOE was always a delegated *policy* choice properly in the political arena, not an adjudicatory one.

Accordingly, the Court finds that the Plaintiff's allegations of deliberate misrepresentations of the Defendants to federal and state officials do not detract from the "validity" of the DOE's and the TNRCC's decisions in this case or the conclusion that the Defendants' successful petitioning efforts were not objectively baseless.[13] The "source, context, and nature" of the petitioning activity and the government's

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[13] The Court will only consider the Plaintiff's specific allegations of misrepresentation, not merely conclusory ones. *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1062 (5th Cir. 1994); *Music Ctr. S.N.C. Di Luciano Pisoni & C. v. Prestini Musica Instruments Corp.*, 874 F.Supp. 543, 549 (E.D.N.Y. 1995) ("To allow antitrust claims based solely on broad and indistinct allegations of misrepresentation and 'sham litigation' to reach discovery, regardless of the role the claimed misrepresentations played, or could have played, in the prior proceeding, would predicate the viability of an antitrust complaint on a petitioner's subjective intent, and not the objective merit of its petition . . . . Moreover, such discovery would have the effect of encouraging antitrust 'strike suits', and effectively chill the First Amendment rights which *Noerr* immunity was intended to protect.").

action restraining trade in the present case all suggest that the alleged misrepresentations attributed to the Defendants were tolerable consequences of debate in the political arena, not punishable misrepresentations in the adjudicatory process. *See Allied Tube & Conduit Corp.*, 486 U.S. at 499; *California Motor Transport Co.*, 404 U.S. at 513. Ultimately, the federal and state officials in the instant case had the delegated responsibility to make policy decisions based upon a balancing of concerns that included competition, safety, and state involvement. *Waste Control Specialists. LLC*, 141 F.3d at 568. To allow an action to go forward challenging the validity of such policy decisions, and in fact without even involving the policymakers themselves as parties in the action, would eviscerate the policy-making role of our government agencies and the deference courts must give to their policy decisions.[14] The Plaintiff would be "effectively asking the courts to intrude into the agency's policy making process without a statutory basis." *Id.* In short, the Court cannot apply the Sherman Act to grant the Plaintiff entrance through the DOE's backdoor knowing full-well that the Plaintiff will not be invited to eat at the table.

Moreover, given the agency decisions in this case, the Plaintiff's allegations are also quite impractical judicially and beyond the scope of the antitrust laws. Notably, under the *Noerr-Pennington* doctrine, the Plaintiff's claim that the Defendants "colluded with key Department of Energy officials charged with reviewing proposals put to that agency by WCS so as to deprive WCS of a fair and impartial government review" is not actionable. *Pl.'s Second Am.*

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[14] Although courts are certainly in the business of *adjudicating* issues and may readily determine whether an effort at litigation was done with "probable cause" or was "baseless", courts are not in the business of determining policy issues delegated to agency discretion. Thus, courts should not attempt to determine the reasonability of *successful* petitioning efforts in the policy-making process because courts simply do not have the agency's expertise to make such determinations.

Compl. at ¶ 94. In *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365 (1991), the Supreme Court held that, between public officials who implement restraints on trade and private individuals who petition for such restraints, "a 'conspiracy' exception to *Noerr* must be rejected . . . . [because] the antitrust laws regulate *business*, not *politics*." *Id.* at 383 (emphasis added). Indeed, as in *City of Columbia*, the Plaintiff in the present case is effectively asking a fact-finder to invalidate the decisions of the DOE and the TNRCC by examining whether the Defendants were successful in completely *duping* or *conspiring* with agency officials to reject the Plaintiff's proposals to enter the DOE's waste disposal market. *Id.* Such a task, the Supreme Court noted, could not be done because it was "impracticable or beyond the purpose of the antitrust laws to identify and invalidate lawmaking that has been infected by selfishly motivated agreement with private interests . . . . [just as it was] impracticable or beyond that scope to identify and invalidate lobbying that has produced selfishly motivated agreement with public officials." *Id.* Indeed, the Plaintiff has not alleged that the Defendants bribed or otherwise engaged in criminal activity with DOE and TNRCC officials. Thus, if the DOE or the TNRCC has in fact abused its own discretionary policy-making authority, that is a question best determined by a direct action against those agencies alleging that their actions violated due process or were otherwise arbitrary and capricious, not by application of the Sherman Act against a successful co-participant attempting to influence the policy-making process.

C. Meaningful Access to Regulatory Processes

Alternatively, although Plaintiff's allegations are essentially that the Defendants' campaign against the Plaintiff was a "sham" which denied it *meaningful access* to the government officials responsible for authorizing access to the DOE's disposal market, the Plaintiff's factual allegations reveal quite

the opposite. *Pl.'s Second Am. Compl.* at ¶¶ 35-42. For example, because of the Plaintiff's discussions with the DOE, the Plaintiff contends that "DOE *senior policy officials* expressed interest in the WCS proposal and reaffirmed their desire to create competition for Envirocare in the private disposal market for DOE's low-level radioactive and mixed wastes." *Id.* at ¶ 38 (emphasis added). Moreover, after the Plaintiff's discussions with the TNRCC, the TNRCC also "expressed interest in the [WCS oversight] proposal, and sent TNRCC *policy makers, technical specialists, and attorneys* to visit the Andrews County Facility." *Id.* at ¶ 39 (emphasis added). Finally, the Plaintiff's lobbying efforts were apparently so persuasive that the Plaintiff formed a "Memorandum of Agreement" to implement its oversight plan with both the DOE and the TNRCC. *Id.* at ¶ 40. Thus, taken as true, the Plaintiff's allegations reveal that the Defendants' "conspiracy" did not really deny the Plaintiff *meaningful access* to state and federal regulatory officials. *Brown & Root, Inc.*, 10 F.3d at 325; *Cf. Whelan v. Abell*, 48 F.3d 1247, 1256 (D.C.Cir. 1995) (assuming that regulatory authorities conducted an independent investigation and found probable cause, the appellate court noted that plaintiffs had no opportunity to contest the findings). Not only did the Plaintiff have meaningful access to agency officials in the political arena, it admittedly had their special attention as well.

The Court also does not agree that the Defendants' "sham" application for a competing waste disposal site in Texas is sufficient to save the Plaintiff's claims. Although the Plaintiff claims that the Defendants' application for its Envirocare of Texas site was a "sham" instituted to create the appearance that Texas was going to become a "dumping ground" for nuclear waste disposal, the Plaintiff's allegations of intent are irrelevant to determining whether the Defendants' actions were objectively baseless. *Professional Real Estate Investors*, 508 U.S. at 63; *Fischer Sand and Aggregate Co.*, 874 F.Supp.

at 960. Furthermore, the Court is at pains to see how the Defendants' competitive application to enter the same business which the Plaintiff proposed in Texas was at all a denial of meaningful access to the state regulatory officials deciding the Plaintiff's separate DOE oversight proposal. The Plaintiff's Complaint certainly establishes that the Plaintiff's applications with the TNRCC were far superior to the Defendants' application. *Pl.'s Second Am. Compl.* at ¶¶ 71-76. However, the Defendants' application did not "directly" interfere with the Plaintiff's own negotiations with the DOE or the TNRCC. *See City of Columbia*, 499 U.S. at 381 (stating that classic example of sham petitioning was filing frivolous *objections* to license application of competitor to *directly* impose expense and delay on competitor). And finally, as this Court has already concluded, the TNRCC's final decision to reject the Plaintiff's oversight proposal with the DOE was entirely within its policy-making discretion and the agency was free to consider information from many sources. Therefore, because the Defendants' successful petitioning efforts are protected under the *Noerr-Pennington* doctrine, the Court will dismiss the Plaintiff's federal antitrust causes of action based upon the Defendants' alleged misrepresentations to agency officials.

D. Denial of "Essential Facility"

Quite simply, "[t]o be an essential facility, . . . a facility must be essential." *Blue Cross & Blue Shield v. Marshfield Clinic*, 65 F.3d 1406, 1413 (7th Cir. 1995), *cert. denied*, 516 U.S. 1184 (1996). Although a "monopolist has no general duty to share his essential facility," *Caribbean Broadcasting System, Ltd. v. Cable & Wireless PLC*, 1998 WL 396239, at *7 (D.C.Cir. 1998), a plaintiff may establish the improper denial of an essential facility by proving that "(1) a monopolist who competes with the plaintiff controls an essential facility, (2) the plaintiff cannot duplicate that facility, (3) the monopolist denied the plaintiff use of the

facility, and (4) the monopolist could feasibly have granted the plaintiff use of the facility." *Id.*

In this case, Plaintiff's allegation that the Defendants threatened to deprive competitors or customers the use of Envirocare's "essential facility" in Utah for their disposal needs or financial assurances requirements does not fall under the *Noerr-Pennington* doctrine because it was not a part of a legitimate petitioning activity. *Pl.'s Second Am. Compl.* at ¶ 62; *Laitram Machinery, Inc. v. Carnitech*, 901 F.Supp. 1155, 1161 (E.D.La. 1995) (*Noerr-Pennington* did not apply to sending letters to competitor's customers alleging violation of trade secrets and patent infringement.). However, the Plaintiff's allegations fall short of establishing a denial of an essential facility. First, assuming the Defendants would not allow the Plaintiff to designate the Defendants' Utah disposal facility as an alternative disposal site in case of the Plaintiff's insolvency, the Plaintiff cannot say that the Defendants' facility was *essential* to obtaining a TDH license where the Plaintiff finally did obtain a TDH license without the Defendants' permission to use the Utah disposal site. *Pl.'s Second Am. Compl.* at ¶ 92. Second, the Plaintiffs allegations cannot connect any delays in TDH licensing with its claimed damages caused by the DOE's and the TNRCC's decisions to reject the Plaintiff's oversight proposals. *See Creek v. Village of Westhaven*, 80 F.3d 186, 189 (7th Cir. 1996) ("The [petitioning] delays did not make it more likely that federal law would change adversely to Creek. Therefore, those changes cannot be deemed 'caused' by the defendant, because, to count as a cause, an act must both be a necessary condition (but-for cause) of the result and make the result antecedently more likely to occur."), *cert. denied*, 117 S.Ct. 180 (1996).

The Plaintiff, however, also contends that the Defendants threatened the Plaintiff's private customers by suggesting that the Utah radioactive waste disposal facility would not be

available to the Plaintiff's customers if those customers did business with the Plaintiff. *Pl.'s Second Am. Compl.* at ¶¶ 95-100. The Plaintiff's claims for damages, however, only relate to the Plaintiff's failure to enter the *DOE's disposal market*, not to injuries in other markets. Thus, the Plaintiff cannot argue for an antitrust injury in this case where valid government decisions have denied the Plaintiff the "legal right" to compete in the relevant market. *Okefenokee Rural Electric Membership Corp.*, 214 F.2d at 418.[15] Therefore, the Court will dismiss the Plaintiff's antitrust claims based on the Defendants' alleged denial of their essential facility to the Plaintiff and the Plaintiff's prospective customers.

E. Other Claims

Finally, the Court must address the Plaintiff's state causes of action for (1) tortious interference with prospective business relations, (2) business defamation, and (3) business disparagement. Under Texas law, "[t]o prove tortious interference with prospective contracts or business relationships, the plaintiff must prove that the defendant willfully and intentionally acted to prevent a contractual relationship that the plaintiff had a reasonable probability of realizing, thus proximately causing the plaintiff actual damages." *Caller-Times Pub. Co. v. Triad Communications, Inc.*, 855 S.W.2d 18, 21 (Tex.Ct.App. 1993). Moreover, "[w]hen a party alleges tortious interference with prospective business relations which are the subject of competition, the party must show he suffered 1) actual damages 2) caused by 3) defendant's intentional acts 4) which interfered with 5) a reasonably probable business relationship and 6) which violated antitrust laws or caused third persons to refuse to

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[15] Even if the Defendants improperly denied their "essential facility" to the Plaintiff and its customers, the "[a]llegations that some petitioning activities are a sham do not defeat *Noerr-Pennington* protection for other petitioning activities." *Classic Communications, Inc. v. Rural Telephone Service Co., Inc.*, 956 F.Supp. 910, 918 (D.Kan. 1997).

deal with the party." *Id.* The instant case, of course, relates to the prospective business relationship between the Plaintiff and the DOE. Plaintiff's claims for damages relate directly to the Defendants' interference with this prospective relationship and *not* to any other parties. However, the Court finds that the Defendants' petitioning activities did not violate the antitrust laws and therefore the Plaintiff's claim for tortious interference with prospective business relations must be dismissed.

Regarding the Plaintiff's defamation and business disparagement causes of action, Texas law recognizes that the two causes of action "[b]oth involve the imposition of liability for injury sustained through publications to third parties of a false statement affecting the plaintiff." *Hurlbut v. Gulf Atlantic Life Ins. Co.*, 749 S.W.2d 762, 766 (Tex. 1987). However, the torts protect different interests because the "action for defamation is to protect the personal reputation of the injured party, whereas the action for injurious falsehood or business disparagement is to protect the economic interests of the injured party against pecuniary loss." *Id.* Consequently, "[a] defamation plaintiff must prove that the allegedly defamatory language is false and that the defendant's publication of the language proximately caused the plaintiff's damages." *Brown v. Petrolite Corp.*, 965 F.2d 38, 43 (5th Cir. 1992). Yet, in a business disparagement claim, the plaintiff must prove "publication by the defendant of the disparaging words, falsity, malice, lack of privilege, and *special damages*." *Hurlbut*, 749 S.W.2d at 766 (emphasis added). Furthermore, the disparaging words "must play a substantial part in inducing others not to deal with the plaintiff' and the resulting special damages would "require[] that the plaintiff 'establish pecuniary loss that has been realized or liquidated as in the case of specific lost sales." *Id.* (quoting W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS, § 128 at 971 (5th Ed. 1984)).

Under the Plaintiff's alleged facts, however, all of the Defendants' false, defamatory, and disparaging statements were in the written and oral petitioning efforts made "with key Texas and federal government officials and media concerning matters of significance and importance to Plaintiff's business." *Pl.'s Second Am. Compl.* at ¶¶ 131, 136. Moreover, the Plaintiff's alleged damages caused by the Defendants' statements arose directly from the DOE's and the TNRCC's decisions rejecting the Plaintiff's DOE oversight proposal. Thus, the Plaintiff's Complaint basically seeks the same damages that it sought in its antitrust claims and is based upon the same misrepresentations. *Id.* at ¶¶ 134, 138. But, as the Court has found, the Defendants' alleged misrepresentations could not invalidate the government action which prevented the Plaintiff from entering the DOE disposal market in this case.

Therefore, two principles require the Court to dismiss the Plaintiff's claims for business disparagement and defamation. First, because the *Noerr-Pennington* doctrine rests on First Amendment petitioning rights, *California Motor Transport Co.*, 404 U.S. at 510-11, then "any behavior by a private party that is protected from antitrust liability by the *Noerr-Pennington* doctrine" should also be outside the scope of other actions based on the same behavior. *Video Intern. Prod. v. Warner-Amex Cable Com.*, 858 F.2d 1075, 1084-85 (5th Cir. 1988) (holding that behavior protected under *Noerr-Pennington* could not constitute a § 1983 claim or a Texas tortious interference with contract claim), *cert. denied*, 490 U.S. 1047 (1989); *Fox News Network*, 962 F.Supp. at 345 ("The doctrine originated as a limit on antitrust liability, but has been used to prohibit other types of proceedings, including civil rights actions and tortuous interference claims."); *Scioto County Regional Water Dist. No. 1 v. Scioto Water, Inc.*, 916 F.Supp. 692, 701 (S.D.Oh. 1995) (*Noerr-Pennington* used for immunity to tortuous interference with business claim). Second, because a plaintiff alleging business

disparagement and defamation must link the alleged false statements to actual damages, the Plaintiff's Complaint fails to state a cause of action. The valid government actions in this case simply prevent the Plaintiff from asserting that the Defendants' various misrepresentations were a proximate cause of the Plaintiff's injuries. *Okefenokee Rural Electric Membership Corp.*, 214 F.2d at 418.

IV. CONCLUSION

The Court finds that the Defendants' successful attempts to influence the policy decisions of federal and state agencies were protected petitioning activities under the *Noerr-Pennington* doctrine. Furthermore, the *Noerr-Pennington* doctrine and the valid government actions in the present case shield the Defendants from the Plaintiff's state-law causes of actions. Therefore, the Court shall grant the Defendants' Motion to Dismiss as to all of the Plaintiff's claims in this case.

Accordingly,

IT IS ORDERED that Defendant's Motion to Dismiss is hereby GRANTED.

IT IS FURTHER ORDERED that the above-captioned cause of action is hereby DISMISSED WITH PREJUDICE. Costs are assessed against the Plaintiff.

IT IS FINALLY ORDERED that all pending Motions are hereby DENIED AS MOOT.

SIGNED this 31 day of August, 1998.

/s/ Lucius D. Bunton,
Honorable Lucius D. Bunton, III
Senior District Judge

APPENDIX C

[Filed May 26, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

MO-98-CA-62

WASTE CONTROL SPECIALISTS, LLC,
Plaintiff,

v.

ENVIROCARE OF TEXAS, INC., ENVIROCARE OF UTAH, INC., KHOSROW B. SEMNANI, CHARLES A. JUDD, FRANK C. THORLEY; BILLY W. CLAYTON, AND NANCY M. MOLLEDA,
Defendants.

ORDER

BEFORE THE COURT, in the above-captioned cause of action, is Plaintiff's Motion to Remand, filed April 21, 1998. After considering Plaintiff's Motion; and the Defendant's Response to Plaintiff's Motion to Remand, filed May 1, 1998, the Court is of the opinion that the following Order is appropriate.

I. BACKGROUND

On April 13, 1998, Defendants Envirocare of Texas, Inc.; Envirocare of Utah, Inc.; Khosrow B. Semnani; Charles A. Judd; Frank C. Thorley; Billy W. Clayton; and Nancy M. Molleda removed the instant case to the United States District Court for the Western District of Texas on the theory that the Plaintiff Waste Control Specialists, LLC, ("WCS") had alleged a strictly federal cause of action against the Defendants in its state court petition.[1] Specifically, the Defendants con-

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[1] The parties concede that there is no diversity jurisdiction in this case and that the Plaintiff has not explicitly plead a federal cause of action.

tend that the Plaintiff cannot maintain an action under the Texas Free Enterprise and Antitrust Act of 1983 because the Plaintiff's First Amended Petition, filed in state court on March 13, 1998, alleged unlawful interference with strictly interstate commerce. Thus, because the Plaintiff can allege violations of only federal antitrust laws under the Sherman Act, 15 U.S.C. §1 *et seq.*, the Defendants contend that removal is proper under federal subject-matter jurisdiction. 28 U.S.C. §§ 1441(a) and 1331 (1997). On April 21, 1998, the Plaintiff filed a Motion to Remand arguing that its state petition adequately sets forth a viable state antitrust claim, and that the instant case should be remanded to state court. The Court will now examine Defendants' claim that the Plaintiff has tried to merely pull the wool over the Court's eyes by disguising a federal antitrust claim, through artful pleading, as a state antitrust claim.

II. STANDARD OF REVIEW

The federal district courts have federal question removal jurisdiction for "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. §§ 1441 & 1331 (1997). Even in the absence of diversity jurisdiction, Congress has provided that the federal courts may also have jurisdiction over cases mixed with both federal and state claims. 28 U.S.C. § 1441(c) (1997). The Court's "determination that a cause of action presents a federal question depends upon the allegations of the plaintiff's well-pleaded complaint." *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 366 (5th Cir. 1995). The Court will examine "if there appears on the face of the complaint some substantial, disputed question of federal law." *Id.* Moreover, the burden of proving subject matter jurisdiction rests with the party attempting to remove a case to federal court. *Getty Oil Corp. v. Ins. Co. of North America*, 841 F.2d 1254, 1257-59 (5th Cir. 1988); *Willy v. Coastal Corp.*, 855 F.2d 1160, 1164 (5th Cir. 1988), *aff'd*, 503 U.S. 131 (1992).

As a general rule, the plaintiff is "the master of his complaint." *Avitts v. Amoco Prod. Co.*, 53 F.3d 690, 693 (5th Cir. 1995). Consequently, a case " 'cannot be made removable by any statement in the petition for removal or in subsequent pleadings by the defendant.' " *Id.* (quoting *Great Northern Ry., Co. v. Alexander*, 246 U.S. 276, 281 (1918)). Indeed, "it is plain that when both federal and state remedies are available, plaintiff's election to proceed exclusively under state law does not give rise to federal jurisdiction." *Id.* "A plaintiff with a choice between federal- and state-law claims may elect to proceed in state court on the exclusive basis of state law, thus defeating the defendant's opportunity to remove, but taking the risk that his federal claims will one day be precluded." *Carpenter*, 44 F.3d at 366.[2]

The Fifth Circuit Court of Appeals, however, also recognizes that a plaintiff cannot "avoid federal jurisdiction by simply 'artfully pleading' a federal cause of action in state law terms." *Avitts*, 53 F.3d at 693.[3] The circuit court notes that the "artful pleading doctrine" is "a narrow exception to the rule requiring the basis of federal question jurisdiction to be found on the face of the plaintiff's well-pleaded complaint

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[2] Of course, a plaintiff does not have a choice between federal and state laws where federal law preempts the state law. *Graef v. Chemical Leaman Corp.*, 106 F.3d 112, 115-16 (5th Cir. 1997).

[3] Arguing that the "scope of the artful pleading exception outside of complete preemption remains unclear," *Corporate Travel Consultants v. United Airlines*, 799 F.Supp. 58, 60 n.1 (N.D. Ill. 1992), not all courts agree that the "artful pleading" doctrine may establish federal question jurisdiction. *Four Way Plant Farm, Inc. v. NCCI*, 894 F.Supp. 1538, 1544 (M.D. Ala. 1995) ("This is simply a case of plaintiffs choosing to limit their theory of recovery to a claim under state law. They have a right to do so. If their only possible claim is actually federal, that does not mean that they will recover in state court on a federal claim; it means that they will lose their lawsuit. The court finds that federal question jurisdiction is not established under the theory of artful pleading.").

and not in any anticipated defense." *Carpenter*, 44 F.3d at 367. Thus, "in certain situations where the plaintiff necessarily has available no legitimate or viable state cause of action, but only a federal claim, he may not avoid removal by artfully casting his federal suit as one arising exclusively under state law." *Id.* at 366. Finally, "[t]he artful pleading doctrine recognizes that the characterization of a federal claim as a state claim will not in all cases prohibit removal *when the plaintiff has no state claim at all.*" *Id.* at 367 ("The doctrine does not convert legitimate state claims into federal ones, but rather reveals the suit's necessary federal character."). Therefore, "if a plaintiff indeed has a viable state law claim, he may depend on it alone and thereby defeat attempts at removal." *Id.* (citing *Caterpillar Inc. v. Williams*, 482 U.S. 386, 391 & n.7 (1987)). Accordingly, the focus of this Court's inquiry is on whether the Plaintiff's state court petition adequately asserts a Texas antitrust cause of action, or whether the Plaintiff's petition is essentially "federal" in character and cannot provide the Plaintiff with a viable state law claim.[4]

III. DISCUSSION

A. Plaintiff's Pleadings

The Plaintiff filed suit in state court against the Defendants on May 2, 1997, alleging that the Defendants intentionally interfered with the Plaintiff's attempts to obtain lucrative government contracts for the disposal of the Department of

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[4] The essential issue in this case is similar to the issue in fraudulent-joinder cases: whether the plaintiff can maintain a state cause of action against the defendant. *Cavallini v. State Farm Mutual Auto Ins. Co.*, 44 F.3d 256, 259 (5th Cir. 1995) (In a fraudulent joinder case, "[t]he removing party must prove that there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the in-state defendant in state court, or that there has been outright fraud in the plaintiff's pleading of jurisdictional facts.").

Energy's ("DOE") low-level radioactive and mixed wastes.[5] The Plaintiff's petition sets forth causes of action for (1) violations of the Texas Free Enterprise and Antitrust Act of 1983, (2) libel and slander, (3) business disparagement and (4) tortious interference with prospective business relations.

Plaintiff's Original Petition in state court plead the following in regards to Plaintiff's state antitrust case:

> 87. Envirocare possesses a monopoly in the private-sector market for *disposal of low-level radioactive wastes*, and maintains monopoly power in such market.
>
> 88. Envirocare possesses a monopoly in the private-sector market for *disposal of mixed wastes*, and maintains monopoly power in such market.
>
> 89. The Defendants, and each of them, as complained of herein, acted to preclude or impede Plaintiff's efforts to secure government authorizations for storage, treatment, and/or disposal of low-level radioactive wastes and/or mixed wastes with the intent to maintain Envirocare's monopolies in the *low-level radioactive and mixed waste disposal markets* in violation of Section 15.05(b) of the Texas Business and Commerce Code.

Pl.'s. Orig. Pet. at ¶¶ 87-89 (emphasis added). In contrast, Plaintiff's First Amended Petition in state court plead the following in regards to Plaintiff's state antitrust case:

> 27. For purposes of this dispute, there are two relevant product markets: (1) the private disposal market for *DOE's mixed waste* that must be disposed of off-site; and (2) the private disposal market for *DOE's low-level radioactive wastes* that must be disposed of off-site. The relevant geographic market, for each of these products, is the entire continental United States.

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[5] "Mixed wastes" are "DOE low-level radioactive waste that also contain[ ] 'hazardous' components (as defined by the federal Resource Conservation and Recovery Act) or 'toxic' components (as defined by the federal Toxic Substances Control Act)." *Pl's First Am. Pet.* at ¶ 14.

> 91. In violation of § 15.05(b) of the Texas Business & Commerce Code ("Texas Free Enterprise Act"), Defendants Envirocare, Envirocare of Texas, and Semnani have willfully possessed and illegally maintained a monopoly in the off-site private disposal market for *DOE's mixed wastes.*
>
> 96. In violation of § 15.05(b) of the Tex. Bus. & Comm. Code, the Defendants Envirocare, Envirocare of Texas, and Semnani have willfully possessed and illegally maintained a monopoly in the off-site private disposal market for *DOE's low-level radioactive wastes.*

Pl.'s First Am. Pet. at ¶¶ 27, 91, and 96 (emphasis added).

The Plaintiff's First Amended Petition also reiterates the various anti-competitive acts that form the basis of its antitrust case. For example, the Plaintiff alleges the following:

> (1) Defendant Khosrow Semnani, who owns the Envirocare companies, obtained and continues to maintain the Defendants' monopoly in the private disposal market for the DOE's mixed and low-level radioactive wastes through illegal means;
>
> (2) the Defendants spread false and misleading information about the Plaintiff to the Texas and U.S. agencies which were considering whether to approve the Plaintiff for the disposal of mixed and low-level radioactive wastes;
>
> (3) the Defendants established "sham" operations in Texas to interfere with the Plaintiff's own applications for government disposal authorizations; and
>
> (4) The Defendants unfairly withheld the availability of Envirocare of Utah's disposal site as an alternative disposal site to the Plaintiff's Texas site in case of the Plaintiff's insolvency.

Pl.'s First Am. Pet. at ¶¶ 34, 37, 59-74, 106 (summarized). The Court now examines whether Plaintiff's pleadings establish a viable state antitrust claim.

B. The Texas Free Enterprise and Antitrust Act of 1983: Interstate or Intrastate? —that is the question!

The Texas Free Enterprise and Antitrust Act of 1983 (the "Act") provides the following purpose and construction:

> **§ 15.04.** *Purpose* and Construction
>
> The purpose of this Act is to maintain and promote economic competition in trade and commerce occurring *wholly or partly within the State of Texas* and to provide the benefits of that competition to *consumers in the state*. The provisions of this Act shall be construed to accomplish this purpose and shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes to the extent consistent with this purpose.

TEX. BUS. & COM. CODE § 15.04 (1987) (emphasis added). In addition to prohibiting other anti-competitive practices, the Act makes it "unlawful for any person to monopolize, attempt to monopolize, or conspire to monopolize any part of trade or commerce." TEX. BUS. & COM. CODE §15.05(b) (1987). In the instant case, the Plaintiff has brought forth a claim of attempted monopolization in violation of §15.05(b). *Pl.'s First Am. Pet.* at ¶¶ 101 & 105.

In accordance with interpretations of federal antitrust statutes, a plaintiff alleging an attempted monopolization must prove "(1) that the defendant has engaged in predatory or anti-competitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993); *See also Caller-Times Publishing Co. v. Triad Communications. Inc.*, 826 S.W.2d 576, 580-81 (Tex. 1992) (Texas Supreme Court looks to federal law for monopolization analysis under state antitrust law). Moreover, "[i]n order to determine whether there is a dangerous probability of monopolization, courts have found it necessary to consider the

relevant market and the defendant's ability to lessen or destroy competition in that market." *Spectrum Sports, Inc.*, 506 U.S. at 456 (emphasis added). Like federal law, Texas's antitrust statutes are "designed to protect competition rather than individual competitors." *Scott v. Galusha*, 890 S.W.2d 945, 950 (Tex.Ct.App. 1994). Such laws "protect the public from the failure of the market . . . . [because of] conduct which unfairly tends to destroy competition itself." *Spectrum Sports, Inc.*, 506 U.S. at 458.

Federal antitrust law does not pre-empt Texas's antitrust law. *Pounds Photographic Labs, Inc. v. Noritsu America Corp. et al*, 818 F.2d 1219, 1226 (5th Cir. 1987); *State v. Southeast Texas Chapter of National Electrical Contractors Ass'n.*, 358 S.W.2d 711, 714 (Tex. Civ. App. 1962), *cert. denied*, 372 U.S. 965 (1963). Indeed, a "state is not generally prohibited from giving effect to its antitrust laws because the regulation affects interstate commerce." *Pounds Photographic Labs*, 818 F.2d at 1226 (citing *Standard Oil Co. v. Tennessee*, 217 U.S. 413, 422 (1910)) (federal pre-emption is not invoked merely because a state law imposes a burden on interstate commerce). However, the Texas antitrust statutes do not apply to actions that are wholly interstate in nature. *Id.* at 1224. The Texas Supreme Court has long recognized that "[a] state has no power to regulate interstate commerce, and is prohibited from so doing by the federal Constitution." *Segal v. McCall Co.*, 184 S.W. 188, 189 (Tex. 1916). The cause of action must implicate intrastate commerce in order for the plaintiff to invoke the protection of the Texas antitrust statutes. *Id.; Cherokee Lab., Inc. v. Rotary Drilling Serv., Inc.*, 383 F.2d 97, 107 (5th Cir. 1967).

Aware of the importance of distinguishing between *interstate and intrastate* commerce, Texas and federal courts "have divided [business] transactions into subparts dealing, respectively, with *interstate* commerce and with *intrastate* commerce and have held that even where the overall transac-

tion primarily affected interstate commerce, the Texas antitrust statutes apply if a component of the transaction implicates intrastate commerce." *Pounds Photographic Labs*, 818 F.2d at 1224 (emphasis added). For example, in *Segal v. McCall Co.*, 184 S.W. 188 (Tex. 1916), the Texas Supreme Court held that the Texas antitrust laws applied to a contract for goods sold from New York to Texas that had both interstate *and* intrastate components. *Id.* at 190. The court found that "[f]or a citizen of New York to sell and transport to a citizen of Texas goods and merchandise is to engage in interstate commerce . . . [and] when the sale and transportation has been completed, and the property has been delivered in Texas to a citizen of Texas, the interstate transaction has ended." *Id.* Therefore, the Court categorized as *intrastate* and within the scope and purpose of the Texas antitrust laws those provisions of the Segal contract which "fix[ed] the price at which the [Texas] vendee shall sell [its goods] at retail in Texas, and provid[ed] that he shall refrain from selling at retail in Texas any other [goods] other than [the vendor's]." *Id.*

Moreover, in *Pounds Photographic Labs, Inc. v. Noritsu America Corp. et al*, 818 F.2d 1219 (5th Cir. 1987), the Fifth Circuit Court of Appeals held that the Texas antitrust laws applied to a cause of action where the defendants attempted "to prevent [the plaintiff] from establishing a [photo] minilab specifically in Austin, thereby restricting trade or lessening competition in the Austin photo lab business." *Id.* at 1224. The appellate court reasoned that "the conduct of the [defendants] had a discrete intrastate impact."*Id.* And, in *Cherokee Lab., Inc. v. Rotary Drilling Serv., Inc.*, 383 F.2d 97 (5th Cir. 1967), cert. denied, 390 U.S. 904 (1968), the Fifth Circuit held that federal antitrust laws, rather than Texas antitrust laws, should be applied to a case where the plaintiff alleged antitrust violations regarding the sale of a product whose market was the "oil field drilling industry in the United States." *Id.* at 100. In *Cherokee*, the plaintiff alleged that the non-Texas defendants entered into an agreement which acted

to make one of them the exclusive distributor of Lytron," a unique substance used in the oil field drilling industry. *Id.* Thus, the plaintiff alleged that the agreement violated the antitrust laws because it forced the plaintiff out of the market as a distributor of Lytron. *Id.* However, noting that the parties' alleged anti-competitive agreements were all performed in *interstate* commerce outside of Texas, the appellate court reasoned that "[t]here was no evidence that [the defendants] imposed any restriction on *intrastate* commerce." *Id.* at 107. Indeed, the plaintiff had acknowledged that "[g]eographically, the market for the product [Lytron] is the United States." *Id.*

In the instant case, the Court finds that the Plaintiff has not adequately alleged a Texas antitrust action because of the wholly interstate, or *non-intrastate*, nature of the DOE private waste-disposal market described in Plaintiff's pleadings. Specifically, the Plaintiff's pleadings essentially establish that the Plaintiff is in competition with the Defendants to provide a service to the DOE alone, not to sell a "product" or market a service to the public or certain segments of the public. For example, the Plaintiff alleges that the Defendants violated the Texas antitrust laws by attempting to monopolize "the disposal market for *DOE's* mixed [and low-level radioactive] wastes." *Pl's First Am. Pet.* at ¶¶ 101 & 105 (emphasis added). Moreover, the Plaintiff clearly states that the relevant market for purposes of its antitrust suit is a national one. *Id.* at ¶ 27. Like the plaintiff in *Cherokee*, the Plaintiff in the instant case clearly acknowledges in its first amended state petition that "[t]he relevant geographic market, for [disposal of DOE's mixed and low-level radioactive wastes], is the entire continental United States."*Id.*

Nevertheless, the Plaintiff contends that the present case is similar to the situation in *Pounds Photographic Labs* because the Defendants attempted to prevent the Plaintiff from establishing a business within the state of Texas. *Pl.'s Mot. Remand* at 6. The Court, however, disagrees. In *Pounds Photo-*

graphic Labs, Inc. v. Noritsu America Corp., 818 F.2d 1219 (5th Cir. 1987), the defendant's actions prevented the plaintiff from establishing a photo-processing lab in Austin, Texas. *Id.* at 1224. True to the purpose of the Texas antitrust laws, the action properly served to protect the interests of Texas consumers who would "benefit" from an increased choice of photo-processing labs for their film. *See* TEX. BUS. & COM. CODE § 15.04 (1987); *Scott v. Galusha*, 890 S.W.2d 945, 950 (Tex.Ct.App. 1994) (antitrust laws protect competition, not individual competitors). In the instant case, however, the Plaintiff does not purport to market goods or services to Texas consumers.[6] The Plaintiff simply competes with the Defendants for contracts with the DOE to dispose of the DOE's wastes. Yes, the Plaintiff and the Defendants have competing businesses within Texas, but the Texas consumer does not participate in the market described in the Plaintiff's allegations.[7] Therefore, the Court finds that the Plaintiff's antitrust allegations implicate wholly *interstate* commerce and

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[6] At most, the Plaintiff can claim that the Defendants' alleged anti-competitive actions indirectly affect Texas consumers who pay federal and state taxes or could have been employed in Plaintiff's disposal facility. However, such a broad view of the Texas antitrust laws would eliminate the need for *any* intrastate component in a state antitrust case. Arguably, under such a broad view, a wholly interstate transaction for *merely* the sale of goods from a New York firm to a Texas firm would also have an impact upon the Texas "consumers" who work at the Texas firm and benefit from the sales contract. However, as explained in this Order, courts do not interpret such a transaction to be *intrastate* and within the state antitrust laws. *See, e.g., Segal v. McCall Co.*, 184 S.W. 188 (Tex. 1916) (mere contract to sell goods from New York to Texas does not have intrastate component unless restrictions are placed on the sale of those goods to consumers within Texas).

[7] The Plaintiff also asserts that some of DOE's waste would come from the DOE's facility in Amarillo, Texas, and that some of the Defendants' anti-competitive acts occurred in Texas. *Pl.'s Mot. Remand* at 5-6. However, Plaintiff's contentions fail to include a role for the Texas consumer for whom the Texas antitrust laws are designed. TEX. BUS. & COM. CODE § 15.04 (1987).

that the Texas Antitrust Act does not apply to the Plaintiff's claims of anti-competitive behavior. Consequently, the Court retains federal subject-matter jurisdiction over the Plaintiff's antitrust Complaint.[8]

C. UNTIMELY REMOVAL?

For parties seeking to remove cases to federal court based upon federal question jurisdiction, Congress has provided that "[i]f the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant . . . of a copy of an amended pleading . . . from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b) (1994); *Burks v. Amerada Hess Corp.*, 8 F.3d 301 (5th Cir. 1993). The Fifth Circuit has noted its rejection of the argument "that the thirty-day removal clock should begin to run when a plaintiff files a pleading that is indeterminate as to removability if the defendant would know in the exercise of due diligence that the case is removable." *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 525 (5th Cir. 1994). Thus, the appellate court held that "the removal clock be[gins] to run. . . . only when the defendant[] receive[s] a pleading that reveal[s] on its face that [the plaintiff] was asserting a cause of action based on federal law." *Id.*

In the instant case, the Plaintiff filed its First Amended Petition in the 109th Judicial District in Andrews County, Texas, on March 13, 1998. The Defendants then filed their Notice of Removal to federal court on April 13, 1998. Plaintiff's first Amended Petition clearly states that the relevant market in the Plaintiff's state antitrust claim is the "off-site

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[8] The Court does not address the merits of the Plaintiff's federal antitrust claim, but only whether the Plaintiff has alleged a viable state antitrust claim. The state claim is not viable if intrastate commerce is not implicated.

private disposal market for *DOE'S mixed wastes. . . .*[and] for *DOE''s low-level radioactive wastes." Pl's. First Pet.* at ¶¶ 91 and 96 (emphasis added). However, the Plaintiff's Original Petition merely categorized the relevant market in the Plaintiff's state antitrust claim as "the private-sector market for *disposal of mixed wastes* and . . . *disposal of low-level radioactive wastes." Pl's. Orig. Pet.* at ¶¶ 87-89 (emphasis added). Realizing that a removal action implicates issues of federalism, this Court finds that the Defendants timely removed the instant case to federal court after the Plaintiff filed its First Amended Petition which clearly limited the relevant market in the Plaintiff's antitrust action to the diaposal of DOE's mixed and low-level radioactive wastes.

III. CONCLUSION

Accordingly,

IT IS ORDERED Plaintiff's Motion for Remand is hereby DENIED.

IT IS FURTHER ORDERED that Plaintiff's Motion to Stay Consideration of Defendants' Motion to Dismiss Pending Deposition [*sic*] of Plaintiff's Motion to Remand, filed April 24, 1998, and Plaintiff's Amended Motion to Stay Consideration of Defendant's Motion to Dismiss Pending Disposition of Plaintiff's Motion to Remand, filed April 29, 1998, are hereby DENIED AS MOOT.

Signed this 25 day of May, 1998.

/s/ Honorable Lucius D. Bunton, III
HONORABLE LUCIUS D. BUNTON, III
Senior U.S. District Judge

APPENDIX D

[Filed June 25, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

MO-98-CA-62

WASTE CONTROL SPECIALSTS, LLC,
Plaintiff,

v.

ENVIROCARE OF TEXAS, INC.; ENVIROCARE OF UTAH, INC.; KHOSROW B. SEMNANI; CHARLES A. JUDD; FRANK C. THORLEY, BILLY W. CLAYTON; AND NANCY M. MOLLEDA,
Defendants.

ORDER

BEFORE THE COURT, in the above-captioned cause of action, is Plaintiff's Motion for Reconsideration of Plaintiff's Motion for Remand, filed June 4, 1998. Also before the Court are Defendants letter brief responding to Plaintiff's Motion for Remand, Filed June 9, 1998; and Plaintiff's letter brief replying to Defendants' letter brief, June 10, 1998. After due consideration, the Court is of the opinion that the Motion should be denied.

Accordingly,

IT IS ORDERED Plaintiff's Motion for Reconsideration of Plaintiff's Motion for Remand is hereby DENIED.

SIGNED this 25 day of June, 1998

/s/ Lucius D. Dunton, III
HONORABLE LUCIUS D. DUNTON, III
Senior U.S. District Judge

APPENDIX E

[Filed Mar. 15, 2000]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50952

WASTE CONTROL SPECIALSTS, LLC,
Plaintiff-Appellant,

versus

ENVIROCARE OF TEXAS, INC.; *et al.*,
Defendants,

ENVIROCARE OF TEXAS, INC.; ENVIROCARE OF UTAH, INC.;
KHOSROW B. SEMNANI; CHARLES A. JUDD;
FRANK C. THORLEY,
Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Texas, Midland

(Opinion January 18, 2000, 5th Cir., 2000 ____F.3d_____)

Before REYNALDO G. GARZA, JOLLY, and WIENER, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

ON PETITION FOR PANEL REHEARING AND
REHEARING EN BANC

The appellees' ("Envirocare") Petition for Panel Rehearing is GRANTED. Part IV of the Opinion is withdrawn and the following section is substituted therefore. In all other

respects, the Petition for Panel Rehearing is Denied. Furthermore, no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is DENIED.

IV

Finally, we note that WCS has asked for the imposition of attorney's fees pursuant to 28 U.S.C. § 1447(c), which states in relevant part: "An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." In this connection, the district court on remand shall decide, in the light of this opinion and other facts and evidence as may be relevant, whether the removal of this case was or was not objectively reasonable, and, thus, whether to enter an appropriate award of attorney's fees as provided in § 1447(c). *See Valdes v. Wal-Mart Stores, Inc.*, 199 F.3d 290 (5th Cir. 2000).

APPENDIX F

[Filed Jan 18, 2000]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRUIT

No. 98-50952
D.C. Docket No. MO-98-CV-62

WASTE CONTROL SPECIALISTS, LLC
Plaintiff-Appellant

v.

ENVIROCARE OF TEXAS INC, *et al*
Defendants

ENVIROCARE OF TEXAS INC; ENVIROCARE OF UTAH INC;
KHOSROW B. SEMNANI; CHARLES A. JUDD;
FRANK C. THORLEY,
Defendants-Appellees

Appeal from the United States District Court for the
Western District of Texas, Midland.

Before REYNALDO G. GARZA, JOLLY, and WIENER, Circuit Judges.

JUDGMENT

This cause Came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is vacated, and the cause is remanded to the District court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that defendants-appellees pay to plaintiff-appellant the cost on appeal to be taxed by the clerk of this court.

ISSUED AS MANDATE: APR 04 2000

(2)
Supreme Court, U.S.
FILED
SEP 25 2000
CLERK

No. 99-1995

In The
Supreme Court of the United States

ENVIROCARE OF TEXAS, INC; ENVIROCARE OF UTAH, INC; KHOSROW B. SEMNANI; CHARLES A. JUDD; FRANK C. THORLEY,

Petitioners,

v.

WASTE CONTROL SPECIALISTS, LLC,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This case presents a peculiar instance in which a federal district court removed plaintiff's purely state law claim from Texas state court to federal court, based solely on the district court's evaluation of Texas law. That is, the sole basis for the exercise of federal jurisdiction was the district court's determination that plaintiff's state law claim was "not viable" under Texas law. In so holding, the district court at once denied plaintiff of both its chosen state court forum, and, because it had already deemed plaintiff's state law claim "not viable," its state law claim as well. Plaintiff therefore had no choice but to amend its complaint to allege a federal cause of action, lest it face the certainty of immediate dismissal in federal court. The unanimous court below correctly concluded that on such extraordinary facts, the district court's actions could not be sustained. For the reasons discussed below, this Court should deny *certiorari*.

STATEMENT OF THE CASE

On May 2, 1997, Plaintiff-Petitioners Waste Control Specialists ("WCS") sued Defendant-Respondents Envirocare of Texas, *et al.* ("Envirocare"), alleging only state law causes of action. In particular, WCS alleged that Envirocare had a monopoly in the business of disposal of low-level radioactive and mixed waste, and had used its monopoly position to prevent the State of Texas from approving WCS's bid to enter the market for low-level radioactive and mixed waste. In doing so, WCS alleged, Envirocare violated the Texas Free Enterprise Code and Antitrust Act of 1993, Tex. Bus. & Com. Code § 15.05(b) (1987) ("Texas Antitrust Act"), as well as the Texas common law of libel, slander, business disparagement, and tortious interference with prospective business relations. The parties engaged in extensive discovery while in state court, resulting in 44 depositions and the production by WCS of approximately 68,134 pages of documents, as well as the appointment of a special master to resolve discovery

disputes. On March 13, 1998, WCS amended its Original Petition; again, however, WCS alleged only violations of Texas antitrust and common law. Thereafter, on April 13, 1998, approximately ten months after WCS initially filed suit, Envirocare sought to remove this case to the United States District Court for the Western District of Texas pursuant to 28 U.S.C. § 1447(b).

WCS immediately filed a motion to remand the case to state court on the ground that its complaint alleged only violations of Texas law. The district court, however, denied this motion. The district court acknowledged that under the well-pleaded complaint rule, "the plaintiff is 'the master of his complaint,' " Pet. App. 47a (citation omitted), and further acknowledged that "[f]ederal antitrust law does not pre-empt Texas's antitrust law." Pet. App. 52a. Nevertheless, the district court held that under the Fifth Circuit's prior decision in *Carpenter v. Wichita Falls Independent School District*, 44 F.3d 362 (5th Cir. 1995), it was obligated to deny the motion to remand if, in its view, plaintiff had "no legitimate or viable state cause of action, but only a federal claim." Pet. App. 48a. The district court then conducted a detailed analysis of Texas antitrust law, *see* Pet. App. 51a-56a, ultimately concluding that "the Texas Antitrust Act does not apply to Plaintiff's claims of anti-competitive behavior." Pet. App. 56a.[1] The district court emphasized that it was "not address[ing] the merits of the Plaintiff's federal antitrust claim, but only whether the Plaintiff ha[d] alleged a viable state antitrust claim." Pet. App. 56a n.8.

---

[1] In so holding, the district court adopted the argument advanced by Envirocare in its opposition to WCS's motion to remand, wherein Envirocare asserted: "Here the only antitrust remedy available to WCS is federal, not because of federal preemption but because, under long-established *Texas* law, the Texas antitrust statute does not reach to exclusively interstate transactions – like those pled in WCS' First Amended Petition." Resp. App. 49a (emphasis in original).

The district court also held that Envirocare's notice of removal, filed ten months after the Original Petition, complied with the 30-day Rule set forth in 28 U.S.C. § 1446(b), pursuant to which a notice of removal must be filed within thirty days of receipt of a pleading "from which it may be first ascertained that the case . . . is or has become removable." The district court reasoned that it was only when WCS filed its First Amended Petition on March 13, 1998, that Envirocare was able to first ascertain that the case was removable; therefore, the notice of removal, filed within thirty days of the First Amended Petition, was timely filed. *See* Pet. App. 56a-57a.

In the face of a district court decision that both denied WCS its state court forum and rejected WCS's state law claims on their merits, WCS filed a Second Amended Complaint, wherein for the first time, it alleged violations of federal antitrust law. R. 1372-1421.

Thereafter, the district court granted Envirocare's Rule 12(b)(6) Motion to Dismiss the Second Amended Complaint. Pet. App. 14a-44a. The district court accorded WCS eleven days and ten pages to respond to this motion, and then held that both the state and federal claims were foreclosed by the *Noerr-Pennington* doctrine. Pet. App. 44a.

A unanimous panel of the Court of Appeals for the Fifth Circuit reversed the district court. Pet. App. 1a-13a. The court expressly declined to address the merits of WCS's claims, but instead, reversed the district court on the sole ground that removal was improper. Pet. App. 6a-7a.

The court first held that the district court erred in denying WCS's motion to remand the case, explaining that the district court's error rested on its erroneous "adoption of language in *Carpenter* to support its holding that the artful pleading doctrine could apply irrespective of the lack of complete preemption." Pet. App. 5a. The court explained that *Carpenter* was, by its terms, limited to instances where a state law claim was not viable *because it had been completely preempted by federal law. Carpenter* was

therefore inapplicable to the present case. Pet. App. 6a. The court thus concluded:

> In this circumstance, WCS remained master of its complaint. Although WCS *could* have alleged a federal cause of action in its state petition, it did not. It filed a complaint in state court alleging wholly state claims in a non-preempted field. Its choice is entitled to respect and precluded removing the case to federal court absent circumstances not presented here. For certain, we express no opinion as to the viability of WCS's state law claims. That is for a Texas court to decide. The district court's order, issued without jurisdiction, can have no preclusive effect.

Pet. App. 6a-7a (internal citation omitted).

The court also held that WCS had not waived its right to challenge the improper removal on appeal when, after the district court had deemed its state law claim "not viable," WCS filed a Second Amended Complaint alleging, for the first time, federal antitrust claims. Pet. App. 7a-11a. Applying the equitable test announced in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996), the court concluded that "the doctrine of waiver after improper removal is not applicable on these facts." Pet. App. 11a. As the court explained, in *Caterpillar*, this "Court noted that the plaintiff, 'by timely moving for remand, did all that was required to preserve his objection to removal,' and held that a plaintiff in this predicament need not seek permission for a 28 U.S.C. § 1292(b) interlocutory appeal in order to preserve the error." Pet. App. 8a (internal citation omitted). Rather, "*Caterpillar* holds that timely objection can preserve the jurisdictional claim despite subsequent amendment, even if other considerations [*i.e.*, finality, efficiency, and economy] may ultimately outweigh that objection." Pet. App. 8a.

In this case, the Fifth Circuit concluded that "other considerations" did not outweigh WCS's properly preserved objection. In particular, the court noted that "[t]his case consumed, relatively, a minimum of judicial

resources," Pet. App. 11a, explaining that "in deciding that waiver is not applicable to WCS, [it was] greatly influenced because there was no trial on the merits," which it noted was at the opposite end of the procedural spectrum from a Rule 12(b)(6) dismissal. Pet. App. 9a-10a. In addition, the court noted that unlike *Caterpillar*, this was not a "diversity case" wherein "[t]here is no difference [between a federal and state court] in treatment of the substance of plaintiff's claims; the change is largely procedural if at all," Pet. App. 8a n.2 (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)), and "f[ound] merit in . . . the narrowness of [WCS's] amendment," which "state[d] the one and only claim the district court suggested it had." *See* Pet. App. 11a n.5.

Accordingly, the court ordered that the district court's "orders are therefore VACATED, and the case is REMANDED to the district court with instructions to remand this action to the state court from which it was removed in accordance with 28 U.S.C. § 1447(c)." Pet. App. 13a.

The court below denied Envirocare's motion to stay its mandate, and Envirocare has not asked this Court to stay that mandate pending resolution of its petition for *certiorari*. Resp. App. 1a-3a. This case, therefore, has already been remanded to the Texas state court, Resp. App. 4a-6a, where proceedings are currently ongoing. Indeed, the Texas District Court of Andrews County, Texas, 109th Judicial District, has set this case to begin trial on November 27, 2000, at 9:00 a.m. Resp. App. 7a.

ARGUMENT

I. *Certiorari* Should Be Denied Because Substantial Jurisdictional Questions Preclude This Court From Addressing The Merits Of The Questions Presented.

Two separate and independent jurisdictional bars, which this Court is obliged to address, *see Steel Co. v. Citizens For A Better Env't*, 523 U.S. 83, 94-95 (1998), prevent this Court from reaching the merits of the questions

presented. First, Envirocare did not comply with the 30-day Rule set forth in 28 U.S.C. § 1447(c), which, by its express terms, prohibits a federal court from taking removal jurisdiction of a case unless the notice of removal was filed within thirty days of a pleading from which the defendant could ascertain that the case was removable. Second, 28 U.S.C. § 1447(d) prohibits any review "by appeal or otherwise," including review by this Court, of an order remanding a case to a state court in accordance with 28 U.S.C. § 1447(c).

A. Envirocare Did Not Comply With The 30-Day Rule Of Section 1446(b).

Section 1446(b) states that a "notice of removal . . . *shall be filed* within thirty days after receipt . . . of the initial pleading" or, "[i]f the case stated by the initial pleading is not removable, . . . within thirty days after receipt . . . of an amended pleading . . . or other paper from which it may be first ascertained that the case . . . is or has become removable." 28 U.S.C. § 1446(b) (emphasis added).[2] Envirocare, by failing to file its notice of removal until ten months after WCS filed its Original Petition, plainly violated this 30-day Rule. Therefore, the district court and, consequently, this Court, lack jurisdiction of this case. *See Steel Co.*, 523 U.S. at 94-95.[3]

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[2] Prior to 1948, the predecessor to section 1446(b) did not contain a specified time period for filing a notice of removal, but simply provided that the petition for removal "*may* [be] ma[de] and file[d]" at a certain time. *Powers v. Chesapeake & Ohio Ry. Co.*, 169 U.S. 92, 100 (1898) (quoting Act of Mar. 3, 1887, c. 373, as corrected by Act of Aug. 13, 1888, c. 866, 25 Stat. 435) (emphasis added). This *discretionary authorization* in the predecessor statute (which was held to be merely " 'modal and formal,' " *id.* at 98 (citation omitted)), is obviously fundamentally distinct from section 1446(b)'s current *mandatory* deadline.

[3] Because the Fifth Circuit disposed of this case on what, in its view, was an alternative jurisdictional ground, *see* Pet. App.

This Court's decisions in *Schact v. United States*, 398 U.S. 58 (1970), and *Missouri v. Jenkins*, 495 U.S. 33 (1990), make clear that section 1446(b)'s 30-day Rule is jurisdictional. Under those cases, a filing deadline explicitly prescribed by statute is deemed a jurisdictional limit on the judicial power. In *Schact*, the Court held that the filing deadline prescribed by then Supreme Court Rule 22(2) was not jurisdictional, explaining that "it must be remembered that this rule was not enacted by Congress but was promulgated by this Court" and, therefore, could "be relaxed by the Court in the exercise of its discretion." *Schact*, 398 U.S. at 64. Justice Harlan, in a concurring opinion, expounded upon the difference between a court-created rule and a duly-enacted act of Congress, and more particularly, why the latter was jurisdictional but the former was not. "In the absence of language providing for waiver," he explained, "we have without exception treated the statutory limitations as jurisdictional." *Id.* at 65 (Harlan, J., concurring) (citing *Matton Steamboat v. Murphy*, 319 U.S. 412 (1943); *Dep't of Banking v. Pink*, 317 U.S. 264 (1942); *Citizens Bank v. Operman*, 249 U.S. 448 (1919)). He elaborated:

> As a matter of statutory interpretation, the Court has not presumed the right to extend time limits specified in statutes where there is no indication of a congressional purpose to authorize the Court to do so. Because we cannot "waive" congressional enactments, the statutory time limits are treated as jurisdictional.

Id. at 68.

In accordance with *Schact*, this Court, in *Missouri v. Jenkins*, 495 U.S. 33 (1990), held that 28 U.S.C. § 2101(c) – which provides that an "appeal or any writ of *certiorari* to . . . the Supreme Court for review shall be taken or

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7a, it had no obligation to address whether Envirocare had satisfied section 1446(b)'s 30-day Rule. *See Arizonans For Official English v. Arizona*, 520 U.S. 43, 66-67 (1997).

applied for within ninety days after the entry of such judgment or decree" – "is mandatory and jurisdictional," and a court has "no authority to extend the period for filing except as Congress permits." 495 U.S. at 45. *See also FEC v. NRA Political Victory Fund*, 513 U.S. 88, 90, 99 (1994). *Cf. Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 357 (1999) (Rehnquist, C. J., joined by Scalia and Thomas, J. J., dissenting) (referring to section 1446(b) as a "jurisdictional statute[ ]").[4]

In this case, the district court held that Envirocare could not ascertain the removability of this case from WCS's Original Petition, and so applied the 30-day Rule

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[4] Notwithstanding *Jenkins* and *Schact*, some lower federal courts have held that the 30-day Rule is not jurisdictional. *See, e.g., Northern Illinois Gas Co. v. Airco Indus. Gases*, 676 F.2d 270, 273 (7th Cir. 1982); *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1212-13 (9th Cir. 1980). Even these courts, however, hold that the 30-day Rule "is a strictly applied rule of procedure and untimeliness is a ground for remand so long as the timeliness defect has not been waived." *Northern Illinois Gas Co.*, 676 F.2d at 273. *See also Fristoe*, 615 F.2d at 1212. Here, there is no argument that WCS waived or is estopped from raising Envirocare's failure to comply with the 30-day Rule, as it vigorously raised this objection both before the district court, *see* Plaintiff's Motion to Remand, R. 637-639; Pet. App. 56a-57a, as well as the court of appeals. *See* Brief of Appellant 25-38, No. 98-50952 (5th Cir. Dec. 23, 1998). Thus, even if it is not jurisdictional, the district court's violation of the 30-day Rule provides a compelling, threshold basis for denying removal here, and thus a significant obstacle to this Court reaching the merits of the questions presented by petitioners. In this regard, it should be noted that the district court's subsequent decision on the merits provides no basis for ignoring or excusing its failure to comply with the 30-day Rule. *See Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 42-43 (1998) (Distinguishing *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996), this Court invalidated a full federal trial because the district court had, contrary to the mandate of 28 U.S.C. § 1407(a), refused to remand the case to another *federal* court).

only to WCS's First Amended Petition. This holding was clear error. Indeed, that Envirocare's basis for removal could be "ascertained" from the Original Petition is not even in dispute in this case, for Envirocare *did in fact ascertain in its Original Answer the very basis upon which it would, nine months later, seek to remove this case to federal court.*

Specifically, in its notice of removal, the sole basis upon which Envirocare asserted that this case was removable was that "Plaintiff's First Amended Petition states clearly for the first time that Plaintiff's allegations of antitrust violations *exclusively involve interstate commerce.*" Resp. App. 9a (emphasis added).[5] In its Original Answer filed on June 9, 1997, however, Envirocare explicitly acknowledged that it had *already ascertained* this very basis for removing the case:

> Defendants specially except to the allegation in Plaintiff's Original Petition that the Defendants violated the Texas Free Enterprise and Antitrust Act of 1983 for the reason that the Plaintiff has failed to properly allege a monopoly violation against the Defendants. *The disposal of low-level radioactive wastes and/or "mixed wastes" referred to in the Original Petition involve exclusively interstate commerce. Transactions which exclusively involve interstate commerce are not subject to Texas antitrust laws and instead are governed by the federal antitrust laws.* Defendants request that the Court sustain this special exception and require the Plaintiff to replead alleging an actionable violation of the Texas Free Enterprise and Antitrust Act of 1983 against the Defendants.

Resp. App. 15a (emphasis added).

In short, Envirocare did, on the basis of WCS's *Original* Petition, in fact "ascertain[ ] that th[is] case is one

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[5] This was likewise the basis upon which the district court sustained the removal. *See* Pet. App. 55a-56a.

which is or has become removable." 28 U.S.C. § 1446(b). Accordingly, Envirocare's notice of removal, filed ten months after WCS filed its Original Petition, was filed out of time and, therefore, this Court has no jurisdiction to reach the merits of the questions presented.

B. Section 1447(d) Precludes This Court From Reviewing The Fifth Circuit's Order Remanding This Case To State Court.

Pursuant to the Fifth Circuit's mandate, this case has already been remanded to state court, where a November 27, 2000, trial date has been set. A decision to grant review in this case would therefore entail the necessity of staying an ongoing state court proceeding and removing the action to federal court. Envirocare has not explained the procedure by which such a stay could be entered. Moreover, any such action would seem to be inconsistent with the principles of *Younger v. Harris*, 401 U.S. 37 (1971). *See id.* at 45 ("the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions"). By failing to seek from this Court an immediate stay of the remand order, Envirocare has made any review by this Court impossible without confronting the significant federalism issues raised by intervening in ongoing state court litigation. This alone constitutes a reason for denying the writ.

It is perhaps for these reasons that Congress, in enacting 28 U.S.C. § 1447(d), specifically precluded *any* review, "on appeal or otherwise," of *any* "order remanding a case to the State court from which it was removed."[6] Section

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[6] Section 1447(d) provides: "An order remanding a case to the State court from which it was removed is not reviewable on appeal *or otherwise*, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise." 28 U.S.C. § 1447(d) (emphasis added). Section 1443, which refers to removal in civil rights cases, is not applicable to the present case.

1447(d) is as applicable to this Court as it is to a court of appeals.[7] Nothing in the text of the statute limits the proscription on review to orders issued by district (as opposed to appellate) courts. The statute's proscription, moreover, is complete, extending to all review "on appeal *or otherwise*." 28 U.S.C. § 1447(d) (emphasis added).[8] *See*

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[7] *Cf. Volvo of Am. Corp. v. Schwarzer*, 429 U.S. 1331 (1976) (Rehnquist, Circuit Justice) (denying stay of district court remand order because review of the order is barred by section 1447(d)); *Ex Parte Matthew Addy S.S. Commerce Corp.*, 256 U.S. 417, 418-19 (1921) (predecessor of section 1447(d) barred Supreme Court from reviewing remand order on petition for writ of *mandamus*); *In re Pennsylvania Co.*, 137 U.S. 451, 453-54 (1890) (same).

[8] Section 1447(d)'s predecessor statute was held not to bar Supreme Court review by writ of *certiorari*. *See Gay v. Ruff*, 292 U.S. 25, 28-30 (1934); *Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, 466-67 (1947). Unlike section 1447(d), however, that predecessor statute barred only review by " 'appeal or writ of error.' " *See Gay*, 292 U.S. at 28 (quoting Judicial Code § 28). This distinction is crucial because, as *Gay* explained, the Circuit Court of Appeals Act of 1891 had granted the Court the power to review by *certiorari* decisions that had not reached final judgment, *see Gay*, 292 U.S. at 30 – that is, decisions that could not be reviewed by appeal or writ of error. *See German Nat'l Bank v. Speckert*, 181 U.S. 405, 409 (1901). *Certiorari* review, therefore, provided a separate basis for reviewing the court of appeals' remand. In 1948, however, immediately after *Aetna* summarily reaffirmed the holding of *Gay*, Congress enacted the broad language of section 1447(d), extending the statutory proscription to *any* review "on appeal *or otherwise*," 28 U.S.C. § 1447(d) (emphasis added) – thus clarifying that the statute barred review by writ of *certiorari*, as well as by appeal or writ of error. In addition, whereas the predecessor statute barred review only of " 'the decision of the district court so remanding,' " *Gay*, 292 U.S. at 28 (quoting Judicial Code § 28), section 1447(d) bars review of *any* "order remanding a case to the State court from which it was removed," 28 U.S.C. § 1447(d), including review by this Court of an order issued by a court of appeals.

Thermatron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 351 (1976) ("There is no doubt that in order to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues, Congress immunized from all form of appellate review any remand order issued on the grounds specified in § 1447(c), whether or not that order might be deemed erroneous by an appellate court."). Indeed, this case is the quintessential example of the evil section 1447(d) was designed to prevent since the Court would have to further delay a pending state court trial in order to resolve the already "protracted litigation of jurisdictional issues." *Id.*[9]

Here, the court below issued an order that this case be remanded to the state court from which it was removed, Pet. App. 13a, and in accordance with this order, this case has been remanded to the state court where it is currently being litigated. Resp. App. 4a-7a. Accordingly, section 1447(d) precludes this Court from reviewing "on appeal or otherwise" the court's order remanding this case to state court.[10]

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[9] This Court has reviewed cases in a procedural posture similar to this, *i.e.*, where the court of appeals reversed the district court's denial of a plaintiff's motion to remand. *See, e.g., Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996). However, the Court never confronted the propriety of doing so in light of section 1447(d), and has "repeatedly held that the existence of unaddressed jurisdictional defects ha[ve] no precedential effect." *Lewis v. Casey*, 518 U.S. 343, 353 n.2 (1996).

[10] Section 1447(d) does not insulate from this Court's review all lower court decisions interpreting the remand statutes, for this Court retains unfettered authority to review appellate court decisions affirming a district court's denial of a motion to remand, as this Court has done on numerous occasions. *See, e.g., Rivet v. Regions Bank*, 522 U.S. 470, 473-74 (1998).

II. The Court Of Appeals' Conclusion That Removal Was Improper On The Unique Facts Of This Case Is Not Worthy Of This Court's Review.

Even assuming the substantial jurisdictional and procedural problems with this case were resolved in petitioner's favor, the case is not worthy of this Court's review on the merits. Contrary to the petition's misleading characterization (as we further explain below), the court below did not opine or suggest that a state law claim which embodies a "substantial-federal-question" could not be removed, for the simple reason that this issue was not before the court since no one contended that WCS's antitrust claim required the court to resolve any federal law issues. Thus, the court below discussed only the "complete preemption" exception to the well-pleaded complaint rule simply because that was the only exception potentially implicated by the case – not because it was *sub silentio* rejecting another possible exception. Specifically, the district court here believed it could remove a state law claim that was not "viable" because it had no merit under state law, but the Fifth Circuit correctly held that courts can remove only state claims that are rendered not "viable" because they are *completely preempted* by federal law. No inferior appellate court disagrees with the Fifth Circuit's holding or reasoning; no federal appellate court has otherwise articulated any rule which authorized removal in this case and there is no split among the federal courts on the vitality of the "substantial-federal-question" exception after *Rivet* – even if that question were presented here. We will examine each point in turn.

1. The district court here removed a purely state antitrust claim to federal court on the grounds that "the Plaintiff has not adequately alleged a *Texas* antitrust action" because, as the "*Texas* Supreme Court has long recognized," the "*Texas* antitrust statutes do not apply to actions that are wholly interstate in nature." Pet. App. 54a, 52a (emphases added). Thus, under the district court's astonishing reasoning, a federal court may take a purely state law claim from state court if, under state law, it

believes the plaintiff fails to state a claim on the merits. There is, of course, no support or logic for the notion that a federal court may remove a purely state law claim if it determines that the claim is not "viable" because there is no merit to it under state law. Pet. App. 50a, 56a n.8. Rather, it may remove a state law claim if the claim is not viable because it has been completely preempted by federal law. In certain circumstances, the "pre-emptive force of [federal law] is so powerful as to displace entirely any state cause of action." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 23 (1983). In these rare cases, then, "any claim purportedly based on that pre-empted state-law claim is considered, from its inception, a federal claim, and therefore arises under federal law." *Rivet v. Regions Bank*, 522 U.S. 470, 476 (1998). Here, it was and is undisputed that federal antitrust law does not completely preempt state antitrust laws, so this doctrine is wholly inapplicable. *See* Pet. 12; Pet. App. 4a, 52a.

Nevertheless, the district court, misinterpreting scattered phrases from complete preemption cases, created a new and facially erroneous removal doctrine – removal is authorized if a state law cause of action fails to state a meritorious claim under state law. The Fifth Circuit simply corrected this obvious error. Citing *Rivet* and other previous cases, the court below held that it was wrong for the district court to opine on the "viability of WCS's allegations . . . [w]ithout complete preemption" because "the viability of WCS's state law claims . . . is for a Texas court to decide." Pet. App. 4a, 7a. The only question for the federal court is whether the viability of the state law claim has been eliminated through complete preemption. There is nothing remotely controversial or questionable about this plainly correct decision.

Apparently recognizing this, petitioners struggle mightily to recast the decision below as somehow rejecting a ground for removal other than complete preemption – *i.e.*, the "substantial-federal-question" exception – which, petitioner maintains, continues to be recognized by other lower courts, and in an article by Professor Arthur Miller,

as viable after this Court's *Rivet* decision. Pet. 13-18. But petitioner's basic premise is facially erroneous: The court below did not reject removal of state law claims which necessarily require resolution of "substantial-federal-questions." It did not do so for the obvious reason that this issue was neither presented nor argued. There is no federal question embedded in WCS's state law claim and no one has ever argued that there was.

A brief analysis of petitioner's argument is necessary to demonstrate how it seeks to present an issue that was not ruled upon by the court below and is not implicated by this case. The basic thrust of the petition is that, according to Professor Miller, removal is appropriate in "three distinct classes of cases," not just in cases involving complete preemption of state law. Pet. 16 (quoting 14b Wright, Miller and Cooper § 3722, at 436). *See also* A. Miller, *"Artful Pleading: A Doctrine in Search of a Definition,"* 76 TEX. L. REV. 1781, 1784 (1998). Specifically, Professor Miller's article states:

> The Supreme Court has recognized three separate categories of cases in which federal courts may deviate from the well-pleaded complaint rule: substantial-federal-question cases, complete preemption cases, and a rather amorphous category apparently based on notions of federal claim preclusion, relevant only to removal jurisdiction and developed by a number of courts of appeals pursuant to the Supreme Court's decision in *Federated Department Stores Inc. v. Moitie.*

Arthur R. Miller, *Artful Pleading: A Doctrine In Search Of A Definition*, 76 TEX. L. REV. 1781, 1784 (footnote omitted). It is incontrovertible that the third exception referenced – the "*Moitie* footnote two exception" – was eliminated by this Court's decision in *Rivet*, leaving only the "complete preemption" and "substantial-federal-question" exceptions. Since the court below explicitly acknowledged the "complete preemption" exception, it *must* be Envirocare's argument that the court below somehow eliminated the "substantial-federal-question" exceptior

The "substantial-federal-question" exception to the well-pleaded complaint rule arises where a plaintiff's ostensibly state-law cause of action has, as an essential element, a substantial issue of federal law.[11] Here, the court below never so much as mentioned the "substantial-federal-question" exception, much less held that the exception no longer existed. As noted, this is because Envirocare could not and did not argue its applicability. Thus, this case does not present a vehicle for addressing the continued existence or scope of this exception.

Indeed, nowhere in the many pleadings, orders, and opinions that form the record in this case, does any party or any court so much as cite this Court's decisions in *Smith*, *Merrell Dow*, or *Moore*, *see supra* note 11, or any other decision arguably within the "substantial-federal-question" line of cases. Rather, in their briefs before the court below, the *only* argument that Envirocare advanced was that removal was proper because, under the Texas courts' interpretation of the Texas Antitrust Act, WCS's state law antitrust claim was "no[t] viable," Resp. App. 36a, and, accordingly, this was the *only* argument that the court below had occasion to address. *See* Pet. App. 4a-7a.

Nor can it plausibly be argued that WCS's state antitrust claim would fall within the "substantial-federal-

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[11] *ARCO Envtl. Remediation v. Dep't of Health & Env't Quality*, 213 F.3d 1108, 1116 (9th Cir. 2000) ("federal jurisdiction may still lie if 'it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims' "). *See Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921); *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 805 (1986) (rejecting removability of state-law products liability suit that alleged "that the drug Bendectin was 'misbranded' in violation of the Federal Food, Drug, and Cosmetic Act"); *Moore v. Chesapeake & Ohio Ry. Co.*, 291 U.S. 205, 214-15 (1934) (rejecting federal question jurisdiction of state law personal injury action alleging that plaintiff's injury was caused by defendant's failure to comply with the Federal Safety Appliance Act).

question" exception even had Envirocare made this argument. Here, WCS's state law antitrust claim is totally independent of federal law: it stands or falls completely on the application of Texas state law, as the district court's evaluation as to its "viability" makes abundantly clear. *See* Pet. App. 51a-56a.

In short, this case cannot provide a vehicle for addressing the question presented: the "substantial-federal-question" exception to the well-pleaded complaint rule was not raised or addressed in the courts below and is inapplicable to this case.

2. In any event, contrary to Envirocare's assertion, there is no circuit split as to the continued existence of the "substantial-federal-question" exception to the well-pleaded complaint rule; every court that has addressed the issue has held that it exists. The cases that Envirocare believe reject its existence do not do so, but rather, like the court below, simply do not address the issue.

Envirocare cites three circuit court cases that, in its view, are inconsistent with the court decision below, *see* Pet. 17 & n.3 – two from the Ninth Circuit, and one from the Second Circuit.[12] It also cites two circuit court cases that are consistent with the court below, *see* Pet. at 17 n.4, and, presumably, inconsistent with the Second and Ninth Circuit decisions cited above – one from the Third Circuit, and one from the Eighth Circuit.[13] These decisions, however, are fully consistent with one another and with the court's decision below for three separate reasons.

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[12] *See ARCO Envtl. Remediation*, 213 F.3d at 1113-14; *Desaigoudar v. California Micro Devices Corp.*, No. 98-15116, 1999 U.S. App. LEXIS 1067 (9th Cir. Jan. 22, 1998) (unpublished memorandum); *Fax Telecommunicationes, Inc. v. AT&T*, 138 F.3d 479, 486-87 (2d Cir. 1998).

[13] *See Goepel v. Nat'l Postal Mail Handlers Union*, 36 F.3d 306, 311-12 (3d Cir. 1994), *cert. denied*, 514 U.S. 1063 (1995); *M. Nahas & Co. v. First Nat'l Bank*, 930 F.2d 608, 612 (8th Cir. 1991).

First, and most importantly, *none* of these decisions *reject* the existence of the "substantial-federal-question" exception to the well-pleaded complaint rule.[14] As in the case below, neither *Goepel* nor *M. Nahas* even addressed, much less resolved, this question. In *M. Nahas*, the Eighth Circuit *sustained* the removal, reasoning that the plaintiff's purportedly state law claim had been completely preempted by federal law. *See M. Nahas*, 930 F.2d at 612. The Eighth Circuit court therefore had no cause to opine on the applicability or existence of the "substantial-federal-question" exception. Likewise, in *Goepel*, the Third Circuit merely held that removal was improper because plaintiffs' New Jersey statutory and contract claims were not "completely preempted" by federal law. *See Goepel*, 36 F.3d at 314. The court did not address the "substantial-federal-question" exception, much less whether it would have provided an alternative basis for removal.[15] Because neither *Goepel* nor *M. Nahas* even addressed the existence of the "substantial-federal-question" exception, they are not at all inconsistent with *ARCO*, *Desaigoudar*, and *Fax*, which do acknowledge its existence (though, as discussed below, none apply it).[16]

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[14] This is equally true of the district court decisions cited in footnote 4 of Envirocare's petition. Pet. 17 n.4. Indeed, one of these decisions, *XF Enterprises, Inc. v. BASF Corp.*, No. 99-3693, 1999 U.S. Dist. LEXIS 16834, at *6-7, 10 n.3 (E.D. Pa. Nov. 2, 1999), expressly acknowledges its existence.

[15] While there is dictum in *Goepel* that could be read to suggest that complete preemption is the only valid ground for removal, *see* 36 F.3d at 311-12, the Third Circuit did not purport to analyze or resolve this question. Not surprisingly, lower courts in the Third Circuit have not read *Goepel* as passing on this issue. *See, e.g., XF Enters., Inc.*, 1999 U.S. Dist. LEXIS 16834, at *10 n.3 ("The court does not read *Goepel* as eliminating removal based upon a substantial-federal-question.").

[16] *See ARCO*, 213 F.3d at 1114; *Desaigoudar*, 1999 U.S. App. LEXIS 1067, at *4; *Fax Telecommunicationes*, 138 F.3d at 486-87.

Second, *all* of these cases are consistent with the court below's resolution of the issue it did address – that is, whether a case can be removed from state to federal court solely because a plaintiff's state law claim is "not viable" – since *none* of these cases even mention, much less accept, this argument. Indeed, the Ninth Circuit's decision in *Desaigoudar*, which Envirocare believes *supports* its view of the law, explicitly rejects the argument that it advanced in the courts below. In *Desaigoudar*, "[i]n an effort to shore up their position, Defendants also argue[d] that Desaiguador's third cause of action, as pleaded, does not adequately state a claim under California law." *Desaigoudar*, 1999 U.S. App. LEXIS 1067, at *6 n.3. The Ninth Circuit dismissed this argument out of hand, stating that "it is enough to simply note that by pleading a state cause of action poorly, a plaintiff does not forfeit her right to a state court forum, nor does she transmogrify her cause of action into a federal one." *Id.*

Indeed, the *only* cases that Envirocare cites as supportive of this theory, set forth in footnotes 2 and 3 of the petition, Pet. 15 n.2, 17 n.3, are district court decisions, several of which were reversed on appeal. All of the district court decisions in footnote 2 of the petition, however, either explicitly rely on *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981), footnote two[17] – the reasoning of which was explicitly rejected by this Court in *Rivet* – or, worse still, are the very decisions cited in *Moitie*

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[17] *See In re NASDAQ Market-Makers Antitrust Litig.*, 929 F. Supp. 174, 178 (S.D.N.Y. 1996); *Mech. Rubber & Supply Co. v. Am. Saw & Mfg. Co.*, 747 F. Supp. 1292, 1294-95, *vacated in part*, 810 F. Supp. 986 (C.D. Ill. 1990); *Patriot Cinemas, Inc. v. Gen. Cinema Corp.*, No. 86-1190-Y, 1986 U.S. Dist. LEXIS 17085, at *6 (D. Mass. Dec. 1, 1986), *vacated and remanded*, 834 F.2d 208, 217 n.4 (1st Cir. 1987); *Buchanan v. Delaware Valley News*, 571 F. Supp. 868, 871 (E.D. Pa. 1983).

footnote two.[18] The decisions cited in footnote 3 of the petition suffer from the same flaw[19] or are irrelevant because they address either the propriety of removal under diversity jurisdiction,[20] complete preemption,[21] or the "substantial-federal-question" exception.[22] None of these decisions even arguably support the novel theory advanced by Envirocare below, *viz.*, that removal is appropriate where a plaintiff's state law claim is "not viable" as a matter of state law.[23]

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[18] *See In re Wiring Device Antitrust Litig.*, 498 F. Supp. 79 (E.D.N.Y. 1980); *Three J Farms, Inc. v. Alton Box Bd. Co.*, No. 78-1257, 1978 U.S. Dist. LEXIS 14134 (D.S.C. Nov. 29, 1978), *rev'd*, 609 F.2d 112 (4th Cir. 1979); *Prospect Dairy, Inc. v. Dellwood Dairy Co.*, 237 F. Supp. 176 (N.D.N.Y. 1964).

[19] *See Temptations, Inc. v. Wager*, 26 F. Supp. 2d 740, 743-44 (D.N.J. 1998).

[20] *See Kobaissi v. Am. Country Ins. Co.*, 80 F. Supp. 2d 488, 489 (E.D. Pa. 2000).

[21] *See Reynolds v. Fergusson*, 73 F. Supp. 2d 841, 843-44 (W.D. Mich. 1999); *Archer v. Arms Tech., Inc.*, 72 F. Supp. 2d 784, 786-88 (E.D. Mich. 1999).

[22] *See Lowe v. NASD Regulation, Inc.*, No. 99-1751, 1999 U.S. Dist. LEXIS 19489, at *9-11 (D.D.C. Dec. 14, 1999); *Servia-Mendoza v. Burgos*, 31 F. Supp. 2d 35, 39-40 (D.P.R. 1998); *Popular Democratic Party v. Puerto Rico*, 24 F. Supp. 2d 184, 188-90, 195 (D.P.R. 1998); *Portage County Bd. of Comm'rs v. City of Akron*, 12 F. Supp. 2d 693, 703 (N.D. Ohio 1998); *Case v. Webb*, No. 98-10064-CIV, 1998 U.S. Dist. LEXIS 21679, at *11 (S.D. Fla. Dec. 8, 1998); *Westwood Nursing Ctr. v. Haveman*, No. 98-CV-74023-DT, 1998 U.S. Dist. LEXIS 20584, at *4-6 (E.D. Mich. Dec. 3, 1998); *Village of Alden v. Cablevision Indus.*, No. 98-CV-325S(H), 1998 U.S. Dist. LEXIS 20339, at *11-12 (W.D.N.Y. Oct. 26, 1998).

[23] Only three district court cases cited in footnote 3 of the petition even arguably support Envirocare's theory. *See Caravanas v. Hall*, No. 99-1405, 1999 U.S. Dist. LEXIS 12741, at *2-6 (E.D. La. Aug. 10, 1999); *Schappel v. UICI*, No. 3:99-CV-1544-G, 1999 U.S. Dist. LEXIS 19444, at *7-8 (N.D. Tex. Dec. 3, 1999); *Baron v. Strassner*, 7 F. Supp. 2d 871, 874-76 (S.D. Tex. 1998). All

Third, in *none* of the circuit court cases cited by Envirocare would the "substantial-federal-question" exception have been applicable, and so the holdings of these cases are all fully consistent with one another.[24] In other words, under the reasoning of any of these cases, including the case *sub judice*, the outcomes would remain unchanged. With respect to the cases that did explicitly reference the exception – *ARCO*, *Desaigoudar*, and *Fax* – all three concluded that removal was improper; they therefore obviously found the "substantial-federal-question" exception inapplicable to the facts presented.[25]

In *M. Nahas*, the "complete preemption" exception provided a basis for removal and, therefore, resort to the "substantial-federal-question" exception was wholly unnecessary. *See M. Nahas*, 930 F.2d at 612. And finally, with respect to *Goepel*, although the court did not expressly address the "substantial-federal-question" exception, its discussion of the complaint makes clear that all of the plaintiff's claims were based exclusively on New Jersey statutes or common law. 36 F.3d at 309.

Although petitioner principally relies on the Ninth Circuit's decision in *ARCO*, that decision neither conflicts with the decision below nor supports Envirocare's theory

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three of these cases, however, are in the Fifth Circuit; they therefore are no longer good law, for they are now governed by the decision below, which has unequivocally rejected Envirocare's theory of removal.

[24] The same is true of the district court cases cited in footnote 4 of the petition. Pet. 17 n.4.

[25] Although the Second Circuit in *Fax* ultimately sustained the district court's denial of the plaintiff's motion to remand, it did so because it concluded that the plaintiff had waived his objection to removal by not objecting to it. *See Fax Telecommunicationes*, 138 F.3d at 487. The Second Circuit, however, was quite clear that "[t]he district court . . . erred when it took jurisdiction over the case" and that "if Fax had objected to removal in the district court, we would vacate the judgment and remand with instructions to return the case to state court." *Id.*

of removal. First, *ARCO* merely acknowledges the existence of the "substantial-federal-question" exception.[26] This hardly conflicts with the decision below, which is completely silent on the subject. Moreover, the "substantial-federal-question" exception, as articulated in *ARCO* (or anywhere else), does not support removal in this case for here, as in *ARCO*, federal law is "not an element" of the state law cause of action. 213 F.3d at 1116. Nor does *ARCO* otherwise remotely endorse the "not viable state law claim" theory advanced by petitioner and embraced by the district court.

In short, all of the circuit court cases that Envirocare cites are consistent with one another; none accept the *only* reasoning upon which removal in this case could be sustained, *viz.*, that removal is proper simply because a plaintiff's state law claim is "not viable" under applicable state law; and at least one case explicitly rejects that reasoning. Every court that has addressed the "substantial-federal-question" exception issue agrees that it exists. And the decisions that Envirocare believes are to the contrary, including this one, simply did not address the issue. Accordingly, this case is not worthy of *certiorari*. *See* Sup. Ct. Rule 10(a).

3. Finally, as this complete absence of support reflects, the court below was clearly correct on the issue that it did address. Federal courts have no more authority

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[26] The Ninth Circuit also recognized a third exception, "where the claim is necessarily federal in character." *See ARCO*, 213 F.3d at 1114, 1115-16. This, however, is a special exception limited to federal statutes that – like the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601, *et seq.* – contain "specific statutory language authorizing *exclusive federal jurisdiction*" over certain causes of action. *ARCO*, 213 F.3d 116 (citing *Brennan v. Southwest Airlines*, 134 F.3d 1405 (9th Cir. 1998)) (emphasis added).

or justification to remove nonmeritorious state law claims than they do to remove meritorious ones.

III. The Court Should Deny *Certiorari* On The Waiver Issue.

Nor should the Court grant *certiorari* to resolve the inherently fact-bound question whether the court below correctly applied the equitable balancing test set forth in this Court's unanimous decision in *Caterpillar*. *Caterpillar* held that, in certain circumstances, a plaintiff's meritorious objection to removal can nonetheless be ignored where, at the time of judgment, a district court has subject matter jurisdiction. *See* 519 U.S. at 73-78. *Caterpillar* involved an instance where diversity jurisdiction, lacking at the time of removal, existed at the time of judgment. *See id.* at 70. The holding and reasoning of the court below does not conflict with *Caterpillar* or any lower court's interpretation of *Caterpillar* and, in any event, does not present an appropriate vehicle for resolving any ambiguity that may remain in the wake of *Caterpillar*.

As an initial, and dispositive, matter, this case cannot possibly provide any general guidance on the circumstances in which it is permissible to overlook an improper removal on the grounds that the court has jurisdiction at the time of judgment. Rather, this case presents a unique and bizarre factual scenario that is created only by virtue of the district court's initially erroneous conclusion that removal is proper because the state law claim had no merit under state law. Since removal was justified on the ground that the state law claim was without merit, the district court, when removing the case, necessarily simultaneously decided that it would dismiss the state law claim that WCS sought to pursue. Thus, the removal decision simultaneously deprived respondent of both its state court forum and the possibility of pursuing a state law claim in the federal forum. In these unique circumstances, WCS could either add the *federal* antitrust claim – "the one and only claim the district court suggested it had," Pet. App.

11a n.5 – or lose its case on the merits. Accordingly, the action allegedly creating federal jurisdiction after removal – adding the federal antitrust claim – was plainly forced on WCS by the district court: it either added the claim or lost the case. No other plaintiff removed to federal court has ever faced such an insoluble dilemma since, as noted, no other appellate court has granted removal on the ground that the state law claim was not "viable" under state law. Thus, the decision below cannot conflict with *Caterpillar* or any other removal case, since in those other cases plaintiffs always had the opportunity to have their state law claim heard on the merits by the federal court.

Equally important, WCS's decision to add the federal claim cannot be fairly characterized as "voluntary" and no fair balancing of the equities would retroactively justify the district court's improper – and properly objected to – removal on the grounds that WCS added a federal claim. Accordingly, the Court's resolution of this case cannot clarify whatever ambiguity exists in federal courts concerning the circumstances in which *Caterpillar* authorizes or requires tolerating improper removal because the federal court possessed jurisdiction at the time of judgment. Moreover, as we discuss below, the court's application of *Caterpillar* to these extraordinary facts was undoubtedly correct and, in any event, the circuit split that Envirocare alleges is illusory.

1. Envirocare's argument that the Fifth Circuit's decision is somehow inconsistent with *Caterpillar* is predicated both on a misreading of *Caterpillar* and the decision below. *Caterpillar* did not hold that a properly preserved objection to removal was waived whenever "post-removal events have occurred that confer jurisdiction on the federal court," Pet. 19; indeed, it held precisely to the contrary. *See Caterpillar*, 519 U.S. at 73-74. Rather, as the court below correctly explained, *Caterpillar* held that a "timely objection can preserve the jurisdictional claim . . . , even if other considerations" – *i.e.*, "finality, efficiency, and economy" – "may ultimately outweigh that objection." Pet. App. 8a. In other words, *Caterpillar* recognized an equitable exception

to the general rule that lack of jurisdiction at the time of removal is fatal to all that follows in federal court. Faithfully applying *Caterpillar*'s legal standard to the facts of this case, the court below merely held that on the facts presented, considerations of "finality, efficiency, and economy" did not outweigh WCS's properly preserved objection to the district court's removal.

In *Caterpillar*, this Court held that the "district court's error in failing to remand a case improperly removed is *not fatal* to the ensuing adjudication," 519 U.S. at 64 (emphasis added) – in other words, that such error did not *automatically result* in invalidation of the jury verdict. Rather, it explained that it would examine certain factors to determine whether the district court's judgment could stand notwithstanding the improper removal.

Most important is whether the plaintiff has properly preserved the objection. If not, then the objection to removal is waived, pursuant to *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951), and *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699 (1972). *See Caterpillar*, 519 U.S. at 72. This Court explained, however, that "neither [*Finn* nor *Grubb*] resolves dispositively a controversy . . . involv[ing] a plaintiff who moved promptly, but unsuccessfully, to remand a case improperly removed from state court to federal court, and then challenged on appeal a judgment entered by the federal court." *Caterpillar*, 519 U.S. at 70-71. Rather, where, as here, a plaintiff properly preserves his objection to removal, that objection to the erroneous removal is *not* waived even if the district court subsequently acquires subject matter jurisdiction of the case. Such a plaintiff, "by timely moving for remand, did all that was required to preserve his objection to removal," and "is [not] . . . required to seek permission to take an interlocutory appeal . . . in order to avoid waiving whatever ultimate right of appeal he may have." *Id.* at 74.

Nevertheless, the Court held, a plaintiff's properly preserved objection to removal could be overcome by consideration of certain equitable factors – that is, the district

court's original error was "not fatal" to its ensuing adjudication on the merits. *Id.* at 64. As the Court explained, "once a diversity case has been tried in federal court, with rules of decision supplied by state law under the regime of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), considerations of finality, efficiency, and economy become overwhelming." *Id.* at 75. *Caterpillar* was a diversity case, where the defendant has a statutory right to have a state law claim adjudicated by a federal court, *see id.* at 75, where the federal litigation already had proceeded for three-and-one-half years including a six-day jury trial, *see id.* at 65-67, and where any retrial in state court would involve precisely the same state law issues already adjudicated. For these compelling reasons, this Court found that "[t]o wipe out the adjudication postjudgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice." *Id.* at 77.

There can be no doubt that the court below properly applied *Caterpillar* to the facts of this case. In contrast to *Caterpillar*'s three-and-one-half years of federal litigation culminating in a six-day jury trial, this case spent a total of four months before the federal district court and was resolved on the pleadings pursuant to Rule 12(b)(6). The only federal litigation, aside from the removal question itself, was Envirocare's Rule 12(b)(6) motion, to which WCS had just eleven days to respond. *See* Pet. App. 11a. This case, moreover, did not involve diversity jurisdiction, pursuant to which the same state law is applied to a plaintiff's state law claim regardless of which forum is selected. Rather, in this case, the district court *compelled* WCS to plead a federal cause of action in order to have a case at all. *See* Pet. App. 8a n.2. Finally, it must be emphasized that this case is *currently being litigated in state court*, and, indeed, a state court trial date has already been set. On these facts, there is no doubt but that pursuant to *Caterpillar*'s equitable factors of "finality, efficiency, and

economy," this case should remain where it currently is – in Texas state court.

Notwithstanding Envirocare's fulminations to the contrary, the rule enunciated by *Caterpillar*, and applied below, is not "illogic[al]" or "perverse." Pet. 27. Indeed, the test is eminently logical. *Caterpillar* confronted a dilemma posed by a properly preserved statutory objection, on the one hand, and the need to preserve scarce judicial resources on the other. This Court, therefore, crafted a standard pursuant to which these competing interests could be weighed. And it held that in a diversity jurisdiction case in which enormous amounts of federal judicial resources had already been consumed, the balance weighed decisively in favor of preserving the federal jury verdict, albeit at the admitted cost of the plaintiff's properly preserved and meritorious statutory objection. The same simply cannot be said of the present case.[27]

2. Envirocare argues that the court below announced a *per se* rule that whenever an improperly removed case has been decided pursuant to Rule 12(b)(6), the appellate court *must* reverse the district court's decision and remand the case to state court. *See* Pet. 21. This assertion, moreover, is the

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[27] Envirocare argues that the interest in preserving the district court's judgment in this case is no different than in a diversity case because "the federal District Court would assess the First Amendment principles underlying the *Noerr-Pennington* doctrine in the same manner as would the state court." Pet. 25. It would be directly contrary to the basic rationale of the well-pleaded complaint rule, however, to allow a federal court to ignore a properly preserved objection to federal question removal on the ground that the defendant could assert the same federal defense in both state and federal court. For the well-pleaded complaint rule rests on the basic principle that " 'a case may not be removed to federal court on the basis of a federal defense, . . . even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case.' " *Rivet*, 522 U.S. at 475 (citation omitted).

precise basis upon which Envirocare alleges that the circuits are split: "there is a conflict in the Circuit Courts as to the proper outcome when the 'ensuing adjudication' to which *Caterpillar* refers is made pursuant to a motion to dismiss." *See* Pet. 21-22 (citing cases).

As the forgoing discussion makes clear, the court below adopted no such *per se* rule. Rather, the fact that the federal litigation consumed few federal judicial resources was but one of several factors – albeit an important one – considered by the court in applying *Caterpillar*'s equitable test. In addition to considering the fact that "[t]his case consumed, relatively, a minimum of judicial resources," Pet. App. 11a, the court considered the fact that this was not a diversity case, *see* Pet. App. 8a n.2, and "the narrowness" of WCS's amendment, which reflected "the one and only claim the district court suggested it had." *See* Pet. App. 11a n.5.

In any event, the alleged circuit split on this issue is completely contrived. Envirocare argues that the Second and Sixth Circuits have held that a properly preserved objection to removal is waived or mooted where the federal litigation has been resolved pursuant to a Rule 12(b)(6) motion.[28] Envirocare then contends that the Fifth Circuit (in this case and previously) and a different panel of the Sixth Circuit have held that the objection is not waived or mooted where there has been a Rule 12(b)(6) adjudication.[29] These cases, however, do not even arguably present a circuit split on "the proper outcome [of a case] when the 'ensuing adjudication' to which *Caterpillar* refers is made pursuant to a motion to dismiss." Pet. 21-22.

Fatal to Envirocare's assertion is the simple fact that all four of these cases were decided prior to *Caterpillar*; they

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[28] *See* Pet. 22 (citing *Barbara v. New York Stock Exch.*, 99 F.3d 49 (2d Cir. 1996); *Vector Research v. Howard & Howard*, 76 F.3d 692 (6th Cir. 1996)).

[29] *See* Pet. 22 (citing *Chivas Products Ltd. v. Owen*, 864 F.2d 1280 (6th Cir. 1988); *Kidd v. Southwest Airlines*, 891 F.2d 540 (5th Cir. 1990)).

therefore could not possibly represent "a conflict in the Circuit Courts" as to the meaning of "the 'ensuing adjudication' to which *Caterpillar* refers." Pet. 22. At a minimum, this Court's limited resources should not be used to clarify its holding in *Caterpillar* before the circuit courts even have an opportunity to apply that decision.

In any event, the decision below is perfectly consistent with *Barbara* and *Vector Research* – the two decisions allegedly creating the split. Neither *Barbara* nor *Vector Research* even addressed the question whether resolution of the waiver issue should be affected by the stage to which the federal litigation had advanced. Even more important, unlike this case or *Caterpillar*, the plaintiff did not object to the removal in either of these cases. *See Barbara*, 99 F.3d at 55; *Vector Research*, 76 F.3d at 697. Thus, both were decided pursuant to this Court's decisions in *Grubbs* and *Finn*[30] – which, as *Caterpillar* directly held, are inapplicable to cases where the plaintiff *has* properly objected to the removal. *See Caterpillar*, 519 U.S. at 70-71.[31]

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[30] *See Barbara*, 99 F.3d at 55 (citing *Grubbs* and *Finn*); *Vector Research*, 76 F.3d at 697 (citing *Grubbs*).

[31] As petitioner's cursory treatment reflects, none of the six decisions cited in footnote 5 of the petition suggest any split. Half of them were decided prior to *Caterpillar* (*Koehnen v. Herald Fire Ins. Co.*, 89 F.3d 525 (8th Cir. 1996); *Bernstein v. Lind-Waldock & Co.*, 738 F.2d 179 (7th Cir. 1984); *Cades v. H&R Block*, 43 F.3d 869 (4th Cir. 1994)), and all of them are totally consistent with the decision below. *Koehnen* involved only the question whether the plaintiff could object to a notice of removal filed out of time; the court simply never addressed the difference between adjudication under Rule 12(b)(6) versus summary judgment. *See* 89 F.3d at 528-29. The other 5 cases involved *summary judgments* after removal, not the Rule 12(b)(6) resolution involved here. *See Akin v. Ashland Chem.*, 156 F.3d 1030, 1033 (10th Cir. 1998), *cert. denied*, 526 U.S. 1112 (1999); *Aqualon Co. v. MAC Equip., Inc.*, 149 F.3d 262, 264 (4th Cir. 1998); *Cades*, 43 F.3d at 872; *Herron v. Local Union 25*, No. 96-1335, 1998 U.S. App. LEXIS 1322, at *2 (6th Cir. Jan. 27, 1998) (unpublished); *Berstein*, 738 F.2d at 182. *Herron*,

In short, there is no circuit split on the question whether there is a *per se* rule that a plaintiff may successfully challenge removal on appeal after a judgment entered pursuant to Rule 12(b)(6), but not after summary judgment – an issue that in any event was not even addressed by the court below.

CONCLUSION

For the forgoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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moreover, was explicitly predicated on the court's finding that nothing in the record "suggest[ed] that [the plaintiffs] were substituting federal claims only as a result of the district court's denial of their motion to remand." *Herron*, 1998 U.S. App. LEXIS 1322, at *11. Thus, *Herron* recognized one of the central concerns of the court below in this case – plaintiff was deprived of *both* its claim and its forum by an erroneous removal ruling and thereby "coerced" into pleading a federal claim. *See* Pet. App. 3a, 11a n.5. And *Berstein*, decided pre-*Caterpillar*, relied on reasoning that *Caterpillar* expressly rejected. That is, *Berstein* reasoned that in order to avoid waiver, the plaintiff should have "stuck by his guns" – *i.e.*, foregone amending his complaint to add a federal claim – "and we would have vindicated his position on appeal." 738 F.2d at 185. In *Caterpillar*, however, this Court explicitly stated that "by timely moving for remand, [the plaintiff] did all that was required to preserve his objection to removal," and that "a plaintiff [is not] required to seek permission to take an interlocutory appeal . . . in order to avoid waiving whatever ultimate appeal right he may have." *Caterpillar*, 519 U.S. at 74.

FILE COPY

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

April 4, 2000

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 98-50952 Waste Control Spec v. Envirocare of Texas USDC No. MO-98-CV-62

Enclosed is an order which has been entered in the appeal referenced above.

Sincerely,

CHARLES R. FULBRUGE III,
Clerk

By: /s/ Debbie Kranz
Debbie Kranz, Deputy
Clerk

Ms Sidney Katherine Powell
Mr Roy Q Minton

P.S. To Ms Powell: In light of the mandate having issued this day, under separate cover, your request to issue the mandate forthwith is considered moot.

MOT-2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50952

WASTE CONTROL SPECIALISTS, LLC

Plaintiff – Appellant

v.

ENVIROCARE OF TEXAS INC; ET AL

Defendants

ENVIROCARE OF TEXAS INC; ENVIROCARE OF UTAH INC; KHOSROW B SEMNANI; CHARLES A JUDD; FRANK C THORLEY

Defendants – Appellees

Appeal from the United States District Court
for the Western District of Texas, Midland

(Filed Apr. 4, 2000)

ORDER:

(x) The motion of Envirocare of Texas, Envirocare of Utah, Khosrow B Semnani, Charles A Judd and Frank C Thorley for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of Envirocare of Texas, Envirocare of Utah, Khosrow B Semnani, Charles A Judd and Frank C Thorley for (X) stay ( ) recall and stay of the issuance of the mandate pending petition

for writ of certiorari is GRANTED to and including . The stay is in force until the final disposition of the case by the Supreme Court, provided that the certificate of the Clerk of the Supreme Court advising that the certiorari petition has been filed is also filed with this court within the time stated above. The clerk shall issue a mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of this stay unless the certificate is filed with the clerk of this court within that time.

/s/ E. Grady Jolly
E. GRADY JOLLY
UNITED STATES CIRCUIT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLANDS-ODESSA DIVISION

WASTE CONTROL SPECIALISTS, LLC, *Plaintiff*	
v.	MO-98-CA-62
ENVIROCARE OF TEXAS, INC.; ENVIROCARE OF UTAH, INC.; KHOSROW B. SEMNANI; CHARLES A. JUDD; FRANK C. THORLEY; BILLY W. CLAYTON; AND NANCY M. MOLLEDA, *Defendants*	

ORDER REMANDING CASE TO STATE COURT

(Filed June 19, 2000)

The above referenced case is an antitrust and business tort action by a waste disposal business against a competitor, alleging state antitrust and business tort claims based on disposal of waste generated by United States Department of Energy. The case was originally brought in the 109th District Court, Andrews County, Texas. Defendants removed the case to federal court on April 13, 1998. This Court denied Waste Control Specialists' motion to remand, and dismissed Plaintiff's complaint on ground that defendant's activities were protected under Noerr-Pennington doctrine. Plaintiff

appealed to the Fifth Circuit Court of Appeals, which held that this Court lacked subject matter jurisdiction over the case, concluding that this action was improperly removed to federal district court and that Waste Control Specialists' motion to remand should have been granted. The Fifth Circuit further directed this Court to award costs and fees to Waste Control Specialists upon submission of proper proof. Upon Defendants' petition for panel rehearing, the Fifth Circuit withdrew the portion of its opinion regarding attorneys' fees and directed the district court to decide "whether the removal of this case was or was not objectively reasonable, and, thus, whether to enter an appropriate award of attorney's fees as provided in [28 U.S.C.] § 1447(c)." (citing *Valdes v. Wal-mart Stores, Inc.*, 199 F.3d 290 (5th Cir. 2000). Now before the Court is Plaintiff's Withdrawal of Claim for Attorneys Fees, and Request for Summary Issuance of the Mandate Remanding the Case to State Court. Plaintiff disclaims its pending request for attorneys fees and costs and requests this Court to remand the case to the district court in Andrews County, Texas. Because Waste Control Specialists no longer urges its request for attorneys fees, the issue of whether it is entitled to attorneys fees is now moot and nothing prevents this Court from remanding the case to the state court from which it was removed, in accordance with the Fifth Circuit's mandate.

Accordingly,

IT IS ORDERED that this case be remanded to the 109th Judicial District Court of Andrews County, Texas, in accordance with 28 U.S.C. § 1447(c) and the Fifth Circuit's mandate.

IT IS FURTHER ORDERED that no costs and fees shall be awarded to Waste Control Specialists, as it has waived its entitlement to recovery.

SIGNED this 19 day of June, 2000.

/s/ Lucius D. Bunton
LUCIUS D. BUNTON, III
SENIOR UNITED STATES
DISTRICT JUDGE

CAUSE NO. 14,580

WASTE CONTROL SPECIALISTS, LLC.	)(	
Plaintiff,	)(	IN THE DISTRICT COURT OF ANDREWS COUNTY, TEXAS 109th JUDICIAL DISTRICT
vs.	)(	
ENVIROCARE OF TEXAS, INC.,	)(	
ENVIROCARE OF UTAH, INC.,	)(	
KHOSROW B. SEMNANI,	)(	
CHARLES A. JUDD,	)(	
FRANK C. THORLEY,	)(	
Defendants	)(	

ORDER SETTING TRIAL

(Filed July 17, 2000)

Parties are advised that the above styled and numbered cause is set for trial beginning Monday, November 27, 2000 at 9:00 o'clock a.m.

SIGNED this the 14th day of July, 2000.

/s/ James L. Rex
JUDGE PRESIDING

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND DIVISION

WASTE CONTROL SPECIALISTS, LLC, Plaintiff,	§	
v.	§	
ENVIROCARE OF TEXAS, INC., ENVIROCARE OF UTAH, INC., KHOSROW B. SEMNANI, CHARLES A. JUDD, FRANK C. THORLEY, BILLY W. CLAYTON and NANCY M. MOLLEDA, Defendants.	§	CASE NO. M098CA062

DEFENDANTS' NOTICE OF REMOVAL

(Filed Apr. 13, 1998)

TO THE HONORABLE UNITED STATES DISTRICT COURT JUDGE:

Defendants Envirocare of Utah, Inc., Envirocare of Texas, Inc., Khosrow B. Semnani, Charles A. Judd, Frank C. Thorley, Billy W. Clayton, and Nancy Molleda file this notice of removal to the United States District Court for the Western District of Texas, Midland Division. The grounds for removal are as follows:

1. The Defendants (except Billy Clayton and Nancy Molleda) are engaged in the business of disposing low-level radioactive waste. Envirocare of Utah owns and operates a disposal site in the State of Utah for low-level radioactive and mixed wastes. The Plaintiff is attempting

to enter into this market in Andrews, Texas. After failing to receive the requisite permits and other business, on May 2, 1997, Plaintiff sued the Defendants in the 109th Judicial District Court of Andrews County, Texas, Cause No. 14,580, alleging causes of action for violations of the Texas Free Enterprise and Antitrust Act of 1983, libel, slander, business disparagement, and tortious interference with prospective business relations.

2. On March 13, 1998, Plaintiff filed Plaintiff's First Amended Petition against the Defendants once again alleging causes of action for violations of the Texas Free Enterprise and Antitrust Act of 1983, libel, slander, business disparagement, and tortious interference with prospective business relations and seeking damages in excess of $3 billion. However, the alleged antitrust violations as stated in Plaintiff's First Amended Petition are fundamentally different than previously alleged and for the first time invoke the federal jurisdiction of the United States District Courts.

3. Specifically, Plaintiff's First Amended Petition states clearly for the first time that the Plaintiff's allegations of antitrust violations exclusively involve interstate commerce. Plaintiff's Original Petition alleged no geographic market and merely alleged monopolization of "the private sector market for the disposal of low-level radioactive wastes" and disposal of "mixed wastes." In contrast, Plaintiff's First Amended Petition alleges a monopoly in "the off-site private disposal market for DOE's mixed wastes" and in "the off-site private disposal market for DOE's low-level radioactive wastes." Plaintiff's First Amended Petition further alleges in Paragraph 27 that "the relevant market, for each of these products, is

the entire continental United States." Plaintiff alleges that Defendants Envirocare of Utah, Envirocare of Texas, and Semnani used their monopoly power to prevent the Plaintiff from receiving waste from the Department of Energy. Plaintiff specifically complains about not receiving a contract from the U.S. Army Corps of Engineers to dispose of certain quantities of DOE's low-level radioactive and mixed wastes and a disposal contract to receive waste from DOE's Fernald Ohio Facility. Clearly, although Plaintiff purports to allege antitrust violations under Texas law (and the Defendants recognize that the Texas statute is not preempted by the Sherman Act), Plaintiff is really alleging strictly federal antitrust violations since Texas law cannot regulate the stream of strictly interstate commerce as alleged in Plaintiff's First Amended Petition. Thus, if Plaintiff's antitrust allegations state a claim at all, they can only state a claim arising under federal law, the Sherman Act, 15 U.S.C. § 1 *et seq.*

4. This removal is filed pursuant to 28 U.S.C. § 1441(a), which provides for the removal of any civil action filed in a state court of which federal courts have original federal jurisdiction under 28 U.S.C. § 1331. Under 15 U.S.C. § 1 *et seq.*, federal courts have original jurisdiction over violations of the federal antitrust laws. The claims for libel, slander, business disparagement, and tortious interference with prospective business relations are also properly removable under the supplemental jurisdiction of the district courts of the United States in that they are so related to the federal antitrust claims that they form part of the same case or controversy.

5. Defendants received a copy of Plaintiff's First Amended Petition on March 13, 1998. This notice is thus

timely having been filed within thirty days of the receipt by the Defendants of the pleading made the basis of this removal, as required by 28 U.S.C. § 1446(b).

6. Plaintiff requested a jury trial in the state court proceeding.

7. All of the Defendants are represented by the undersigned counsel and consent to the removal of this action.

8. Defendants will promptly give Plaintiff written notice of the filing of this notice of removal as required by 28 U.S.C. § 1446(d). Defendants will also file a copy of this notice with the Clerk of the District Court of Andrews County, Texas, also pursuant to 28 U.S.C. § 1446(d).

9. Attached as Exhibit A is a copy of Plaintiff's First Amended Petition. With the filing of this Notice of Removal, Defendants have filed a copy of the state court pleadings with the Clerk of this Court.

Dated this 13th day of April, 1998.

Respectfully submitted,

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ATTORNEYS FOR THE DEFENDANTS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing has been forwarded to the following by certified mail on the 13th day of April, 1998:

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/s/ Roy Q. Minton
Roy Q. Minton

CAUSE NO. 14,580

WASTE CONTROL SPECIALISTS, LLC, Plaintiff, v. ENVIROCARE OF TEXAS, INC., ENVIROCARE OF UTAH, INC., KHOSROW B. SEMNANI, CHARLES A. JUDD, FRANK C. THORLEY, GEORGE W. HELLSTROM, BILLY W. CLAYTON, and NANCY M. MOLLEDA, Defendants.	§ § § § § § § § § § § § § § §	IN THE DISTRICT COURT OF ANDREWS COUNTY, TEXAS 109TH JUDICIAL DISTRICT

DEFENDANTS' ORIGINAL ANSWER

(Filed Jun. 9, 1997)

TO THE HONORABLE JUDGE OF SAID COURT:

Defendants Envirocare of Texas, Inc., Envirocare of Utah, Inc., Khosrow B. Semnani, Charles A. Judd, Frank C. Thorley, George W. Hellstrom, Billy W. Clayton, and Nancy M. Molleda (hereinafter collectively referred to as the "Defendants") file the following Original Answer to Plaintiff's Original Petition:

GENERAL DENIAL

I.

As authorized by Rule 92 of the Texas Rules of Civil Procedure, Defendants enter a general denial of the matters pleaded by the Plaintiff and request that the Court require Plaintiff to prove its charges and allegations as required by the law.

SPECIAL EXCEPTIONS

II.

Defendants specially except to the allegation in Plaintiff's Original Petition that the Defendants violated the Texas Free Enterprise and Antitrust Act of 1983 for the reason that the Plaintiff has failed to properly allege a monopoly violation against the Defendants. The disposal of low-level radioactive wastes and/or "mixed wastes" referred to in the Original Petition involve exclusively interstate commerce. Transactions which exclusively involve interstate commerce are not subject to Texas antitrust laws and instead are governed exclusively by the federal antitrust laws. Defendants request that the Court sustain this special exception and require the Plaintiff to replead alleging an actionable violation of the Texas Free Enterprise and Antitrust Act of 1983 against the Defendants.

III.

Defendants specially except to the allegation in Plaintiff's Original Petition that the Defendants violated the Texas Free Enterprise and Antitrust Act of 1983 for the

reason that the Plaintiff has failed to properly allege a monopoly violation against the Defendants. Defendants stand in the relationship of principal and agent; therefore, as a matter of law Envirocare of Utah, Inc. and/or Envirocare of Texas, Inc. could not have conspired with Khosrow B. Semnani, Charles A. Judd, Frank C. Thorley, George W. Hellstrom, Billy W. Clayton, or Nancy M. Molleda in violation of the antitrust laws to create a monopoly violation as alleged by the Plaintiff. Defendants request that the Court sustain this special exception and require the Plaintiff to replead alleging an actionable violation of the Texas Free Enterprise and Antitrust Act of 1983 against the Defendants.

IV.

Defendants specially except to the allegation in Plaintiff's Original Petition that the Defendants violated the Texas Free Enterprise and Antitrust Act of 1983. The Plaintiff fails to properly allege and identify the "relevant market" for antitrust purposes. Defendants request that the Court sustain this special exception and require the Plaintiff to replead alleging the "relevant market" for purposes of a claim under the Texas Free Enterprise and Antitrust Act of 1983.

V.

Defendants specially except to the allegation in Plaintiff's Original Petition that the Plaintiff is entitled to damages for violation of the Texas Free Enterprise and

Antitrust Act of 1993, libel and slander, business disparagement, and tortious interference with prospective business relations. Plaintiff's alleged damages are not capable of reasonable ascertainment, but instead are speculative and conjectural. Defendants request that the Court sustain this special exception and require the Plaintiff to replead alleging damages for purposes of a claim under the Texas Free Enterprise and Antitrust Act of 1983 which are capable of reasonable ascertainment.

VI.

Defendants Khosrow B. Semnani, Charles A. Judd, Frank C. Thorley, George W. Hellstrom, Billy W. Clayton, and Nancy M. Molleda specially except to Plaintiff's Original Petition in which it is alleged that they are individually liable for violating the Texas Free Enterprise and Antitrust Act of 1983, libel and slander, business disparagement, and/or tortious interference with prospective business relations. Defendants Khosrow B. Semnani, Charles A. Judd, Frank C. Thorley, George W. Hellstrom, Billy W. Clayton, and Nancy M. Molleda deny that they are liable in the individual capacity in which they have been sued for the reason that the Defendants were at all material times acting as the agents of Envirocare of Utah, Inc. and/or Envirocare of Texas, Inc. and within the scope of proper authority. Defendants request that the Court sustain this special exception and require the Plaintiff to replead alleging the manner in which each of the individual Defendants are liable in their individual capacities for each cause of action.

VII.

Defendants specially except to the allegation in Plaintiff's Original Petition that the Defendants are liable to the Plaintiff for libel and slander. Plaintiff fails to identify the defamatory statements each of the particular Defendants published. Defendants request that the Court sustain this special exception and require the Plaintiff to replead alleging the defamatory statements each particular Defendant allegedly published to a third party.

VIII.

Defendants specially except to the allegation in Plaintiff's Original Petition that the Defendants are liable to the Plaintiff for tortious interference with prospective business relations. Plaintiff alleges that each of the Defendants "intentionally interfered with the Plaintiff's business relations with governmental agencies having authority to issue authorizations for the Plaintiff's entry into relevant markets for the storage, treatment, and/or disposal of low-level radioactive and mixed wastes, and/or to provide the Plaintiff with government contracts of substantial value to the Plaintiff." Plaintiff fails to identify and give the Defendants fair notice of the referenced prospective "business relations," "governmental agencies," "relevant markets," and "government contracts." Defendants request that the Court sustain this special exception and require the Plaintiff to replead identifying the prospective business relations, governmental agencies, relevant markets, and government contracts.

IX.

Defendants specially except to the allegation in Plaintiff's Original Petition that the Defendants are liable to the Plaintiff for tortious interference with prospective business relations. Plaintiff fails to allege and identify that with a "reasonable probability" the Plaintiff would have entered into a contract or business relationship with a governmental agency or other entity but for the Defendants' interference. Defendants request that the Court sustain this special exception and require the Plaintiff to replead alleging facts sufficient to support a claim that with a "reasonable probability" the Plaintiff would have entered into a contract or business relation with a governmental agency or other entity but for the Defendants' interference.

X.

Defendants specially except to the allegation in Plaintiff's Original Petition that the Defendants are liable to the Plaintiff for tortious interference with prospective business relations. Plaintiff fails to properly allege a cause of action for tortious interference with prospective business relations against the Defendants because the Plaintiff does not adequately plead how the complained of actions violated the antitrust laws or caused the governmental agencies or other entities to refuse to deal with the Plaintiff. Defendants request that the Court sustain this special exception and require the Plaintiff to replead alleging how the complained of conduct violated the antitrust laws or caused any third party to refuse to deal with the Plaintiff.

XI.

Defendants specially excepts to the allegation in Plaintiff's Original Petition that the Defendants are liable to the Plaintiff for business disparagement for the reason that it fails to allege a cognizable cause of action under Texas law. Business disparagement is not a recognizable separate cause of action from libel which can afford independent relief to the Plaintiff.

XII.

Defendants specially except to the allegation in Plaintiff's Original Petition that the Plaintiff "has realized pecuniary loss in the form of specific lost sales. . . . " However, the Plaintiff never identifies the "specific lost sales" which is necessary to allow the Defendants the opportunity to raise appropriate defenses. Defendants request that the Court sustain this special exception and require the Plaintiff to replead identifying with at least a reasonable degree of particularity the "specific lost sales."

AFFIRMATIVE DEFENSES

XIII.

By way of further answer, if any is necessary, Defendants allege that the alleged defamatory statements at issue are true and/or substantially true.

XIV.

By way of further answer, if any is necessary, Defendants allege that the alleged defamatory statements at issue contain statements of opinion and other statements that are not actionable assertions of fact about the Plaintiff.

XV.

By way of further answer, if any is necessary, Defendants allege that they are entitled to immunity from any liability under the Texas Free Enterprise and Antitrust Act of 1983 as it relates to the allegations that the Defendants improperly lobbied and contacted governmental officials. Defendants specifically deny that they ever did anything to improperly influence government officials. Nonetheless, efforts to influence public officials do not violate the antitrust laws even if the intended result is the elimination of competition. Stated differently, persons who engage in a publicity campaign directed toward influencing governmental action is immune, even if dishonest means were used in the publicity campaign and even if a side effect of the campaign was to injure the competitor's campaign.

XVI.

By way of further answer, if any is necessary, Defendants allege that if the Defendants have obtained monopoly power, it was not willfully acquired or maintained. Instead, it resulted from growth of development as a

consequence of a superior product, business acumen, or historical accident.

XVII.

By way of further answer, if any is necessary, Defendants Khosrow B. Semnani, Charles A. Judd, Frank C. Thorley, George W. Hellstrom, Billy W. Clayton, and Nancy M. Molleda allege that they are not liable in their individual capacities.

XVIII.

By way of further answer, if any is necessary, Defendants allege that they are privileged from liability for any of the complained of conduct. The Defendants only engaged in reasonable competition within the realm of fair play.

COUNTERCLAIMS

XIX.

Defendants allege that Plaintiff's action is groundless and brought in bad faith or for the purpose of harassment. Defendants therefore request that they be awarded their costs, reasonable attorney's fees, and other litigation expenses from the Plaintiff.

WHEREFORE, Defendants Envirocare of Texas, Inc., Envirocare of Utah, Inc., Khosrow B. Semnani, Charles A. Judd, Frank C. Thorley, George W. Hellstrom, Billy W. Clayton, and Nancy M. Molleda request that the Court sustain their special exceptions and ultimately obtain a

judgment of the Court that the Plaintiff, Waste Control Specialists, LLC, take nothing by this suit and that the Defendants recover their costs, reasonable attorney's fees, and other litigation expenses.

Respectfully submitted,

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COUNSEL FOR THE DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served on the following on this 9th day of June, 1997:

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/s/ Roy Q. Minton
ROY Q. MINTON

VERIFICATION

Before me, the undersigned Notary Public, on this day personally appeared Frank C. Thorley, a duly authorized representative of Environcare of Utah, Inc. and Envirocare of Texas, Inc., who, after being duly sworn, stated that he has read the above pleading and that the statements contained in Paragraphs III, XIV, XV and XVIII

of the pleading are within his personal knowledge and are true and correct.

/s/ F. C. Thorley
Frank C. Thorley

SUBSCRIBED AND SWORN TO BEFORE ME on the 4 day of June, 1997.

/s/ Deborah R. Pariseau
Notary Public in and for
the State of Utah
My commission expires
Sept. 13, 1999

[SEAL]
Notary Public
DEBORAH R. PARISEAU
4181 West Kirkcaldy Circle
South Jordan, Utah 84095
My Commission Expires
September 13, 1999
State of Utah

VERIFICATION

Before me, the undersigned Notary Public, on this day personally appeared Khosrow B. Semnani, who, after being duly sworn, stated under oath that he is the defendant in this action; that he has read the above pleading; and that every statement contained Paragraphs III, VI, XIV, XV, XVII, and XVIII of the pleading are within his personal knowledge and are true and correct.

/s/ Khosrow B. Semnani
Khosrow B. Semnani

SUBSCRIBED AND SWORN TO BEFORE ME on the 4 day of June, 1997.

/s/ Deborah R. Pariseau
Notary Public in and for
the State of Utah
My commission expires
Sept. 13, 1999

[SEAL]
Notary Public
DEBORAH R. PARISEAU
4181 West Kirkcaldy Circle
South Jordan, Utah 84095
My Commission Expires
September 13, 1999
State of Utah

VERIFICATION

Before me, the undersigned Notary Public, on this day personally appeared Charles A. Judd, who, after being duly sworn, stated under oath that he is the defendant in this action; that he has read the above pleading; and that every statement contained Paragraphs III, VI, XIV, XV, XVII, and XVIII of the pleading are within his personal knowledge and are true and correct.

/s/ Charles A. Judd
Charles A. Judd

SUBSCRIBED AND SWORN TO BEFORE ME on the 4 day of June, 1997.

/s/ Deborah R. Pariseau
Notary Public in and for
the State of Utah
My commission expires
Sept. 13, 1999

[SEAL]
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DEBORAH R. PARISEAU
4181 West Kirkcaldy Circle
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My Commission Expires
September 13, 1999
State of Utah

VERIFICATION

Before me, the undersigned Notary Public, on this day personally appeared Frank C. Thorley, who, after being duly sworn, stated under oath that he is the defendant in this action; that he has read the above pleading; and that every statement contained Paragraphs III, VI, XIV, XV, XVII, and XVIII of the pleading are within his personal knowledge and are true and correct.

/s/ F. C. Thorley
Frank C. Thorley

SUBSCRIBED AND SWORN TO BEFORE ME on the 4 day of June, 1997.

/s/ Deborah R. Pariseau
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My commission expires
Sept. 13, 1999

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September 13, 1999
State of Utah

VERIFICATION

Before me, the undersigned Notary Public, on this day personally appeared George W. Hellstrom, who, after being duly sworn, stated under oath that he is the defendant in this action; that he has read the above pleading; and that every statement contained Paragraphs III, VI, XIV, XV, XVII, and XVIII of the pleading are within his personal knowledge and are true and correct.

/s/ George W. Hellstrom
George W. Hellstrom

SUBSCRIBED AND SWORN TO BEFORE ME on the 4 day of June, 1997.

/s/ Deborah R. Pariseau
Notary Public in and for
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My commission expires
Sept. 13, 1999

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Notary Public
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September 13, 1999
State of Utah

VERIFICATION

Before me, the undersigned Notary Public, on this day personally appeared Billy W. Clayton, who, after being duly sworn, stated under oath that he is the defendant in this action; that he has read the above pleading; and that every statement contained Paragraphs III, VI, XIV, XV, XVII, and XVIII of the pleading are within his personal knowledge and are true and correct.

/s/ Billy W. Clayton
Billy W. Clayton

SUBSCRIBED AND SWORN TO BEFORE ME on the 4th day of June, 1997.

/s/ Myra Sutherland
Notary Public in and for
the State of Texas
My commission expires
3-30-01

[SEAL]
MYRA SUTHERLAND
Notary Public, State of Texas
My Commission Expires
MARCH 30, 2001

VERIFICATION

Before me, the undersigned Notary Public, on this day personally appeared Nancy M. Molleda, who, after being duly sworn, stated under oath that he is the defendant in this action; that he has read the above pleading; and that every statement contained Paragraphs III, VI, XIV, XV, XVII, and XVIII of the pleading are within his personal knowledge and are true and correct.

/s/ Nancy M. Molleda
Nancy M. Molleda

SUBSCRIBED AND SWORN TO BEFORE ME on the 4th day of June, 1997.

/s/ Bennie Anderson
Notary Public in and for
the State of Texas
My commission expires
5-4-2001

[SEAL]
BENNIE ANDERSON
Notary Public, State of Texas
My Commission Expires
MAY 4, 2001

NO. 98-50952

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WASTE CONTROL SPECIALISTS, L.L.C.,
Plaintiff-Appellant

v.

ENVIROCARE OF TEXAS, INC., ENVIROCARE OF UTAH, INC., KHOSROW B. SEMNANI, CHARLES A. JUDD, AND FRANK C. THORLEY,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION
MO-98-CV-62

BRIEF FOR APPELLEES

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* * *

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* * *

In this case, WCS cured any alleged federal jurisdictional defect by voluntarily amending its Complaint to expressly allege a federal cause of action and by doing so confirmed its consent to adjudicate its suit in federal court. Following such amendment, this case proceeded to judgment and fairness to both parties was uncompromised throughout the process. The District Court clearly obtained jurisdiction before the entry of final judgment, and case law confirms that since federal jurisdiction existed, remand is improper.

II. THE DISTRICT COURT'S DENIAL OF WCS' MOTION TO REMAND WAS CORRECT.

Even if WCS may challenge the District Court's decision on the remand issue, that challenge should be rejected.

A. The First Amended Petition's Antitrust Allegations Could Only Be Addressed Through Application of the Sherman Act.

Where a state claim and a federal claim are available to plaintiff, it may avoid removal by bringing only the former in a state court. Plaintiff may not, however, avoid removal by pleading in state law terms a claim that is, in fact, solely federal in nature. *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 366 (5th Cir. 1995).

The Texas Free Enterprise and Antitrust Act, TEX BUS. & COM. CODE §§ 15.01 *et seq.*, ("Texas Act") does not apply to WCS' antitrust claims. Because WCS' allegations could be addressed only through application of the Sherman Act, 15 U.S.C. §§ 1 *et seq.*, no viable state claim was available and removal was proper. *See Carpenter*, 44 F.3d at 366 (case removable where plaintiff "has available no legitimate or viable state cause of action").[3]

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[3] Numerous cases have upheld removal on this ground in the antitrust context. *See, e.g., Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, CA 3-95-CV-1010-G (N.D. Tex. 1996) (attached at Tab B), *aff'd*, 145 F.3d 320 (5th Cir. 1998), *cert. denied*, 1999 WL 8053 (U.S. Jan. 11, 1999); *In re NASDAQ Mkt. Makers Antitrust Litig.*, 929 F. Supp. 174 (S.D.N.Y. 1996); *Mechanical Rubber & Supply Co. v. American Saw & Manuf. Co.*, 747 F. Supp. 1292, *vacated in part*

1. The First Amended Petition Does Not Allege Harm To Any Texas Consumer.

Antitrust law protects consumers, not individual competitors. *Roy B. Taylor Sales v. Hollymatic Corp.*, 28 F.3d 1379, 1382 (5th Cir. 1994); *Scott v. Galusha*, 890 S.W.2d 945, 950 (Tex. App. – Fort Worth 1994, writ denied). The Texas Act makes this clear:

> The purpose of this Act is to maintain and promote economic competition in trade and commerce occurring wholly or partly within the State of Texas and to provide the benefits of that competition to consumers in the state.

TEX. BUS. & COM. CODE § 15.04. *See Caller-Times Publishing Co. v. Triad Communications, Inc.*, 826 S.W.2d 576, 581 (Tex. 1992) (Texas Act seeks to "benefit the consumers of the state," not individual competitors).

WCS' First Amended Petition alleged (1) that the product (more accurately, service) market at issue was

---

on other grounds, 810 F. Supp. 986 (C.D. Ill. 1990); *Patriot Cinemas, Inc. v. General Cinema Corp.*, 1987-1 Trade Cases (CCH) ¶ 67,453 (D. Mass. 1986), *vacated and remanded on other grounds*, 834 F.2d 208 (1st Cir. 1987); *Buchanan v. Delaware Valley News*, 571 F. Supp. 868 (E.D. Pa. 1983); *Salveson v. Western States Bankcard Ass'n*, 525 F. Supp. 566 (N.D. Cal. 1981), *modified*, 731 F.2d 1423 (9th Cir. 1984); *In re Wiring Device Antitrust Litig.*, 498 F. Supp. 79 (E.D.N.Y. (1980); *Three J Farms, Inc. v. Alton Box Bd. Co.*, 1979-1 Trade Cases (CCH) ¶ 62,423 (D.S.C. 1978); *Prospect Dairy, Inc. v. Dellwood Dairy Co.*, 237 F. Supp. 176 (N.D.N.Y. 1964). Such cases rebut WCS' suggestion, discussed *infra*, that removal in this context cannot occur because such removal would be improperly based on a "federal defense" of "preemption" or because the alleged conduct affected a business located in the state at issue.

limited to private disposal of DOE's radioactive waste and (2) that the sole purchaser of that service was DOE. *See, e.g.*, FAP ¶¶ 12, 27, 91-107 (R. 277, 281, 307-10).

Thus the only consumer whose interest is affected by the state of competition in the relevant market is the United States government. In such circumstances the Texas Act does not apply. *See Destec Energy, Inc. v. Southern California Gas Co.*, 5 F. Supp. 2d 433, 464 (S.D. Tex. 1997) (Texas Act does not apply simply because conduct at issue "has some effect on a Texas entity"; Act inapplicable where defendant did nothing "affecting the ability of Texas consumers to obtain the benefits of competition"); IP. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 216 at 295 (rev. ed. 1997) (hereinafter "AREEDA ¶ ___") (state statute applies where case involves "sufficient injury to [the state's] consumers").

WCS tries to skirt the issue by suggesting that its pleading implicates the interest of Texas citizens or taxpayers generally. Brief 32-33. This ignores the point of antitrust law, which is to benefit those who purchase the product in the relevant market by promoting competition therein. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979); *Caller-Times*, 826 S.W.2d at 582 (central goal of Texas act is "[l]ow prices for consumers"). This is undoubtedly why the Legislature, having used the broad term "person" throughout the Act, chose instead the precise term "consumer" in § 15.04.

If any impact on a "citizen" of a state were sufficient to invoke that state's antitrust law, then federal question removal in antitrust cases would never be appropriate since the realities of modern commerce dictate that one

could always divine **some** impact attenuated or otherwise, upon one or more taxpayers or businesses in a given state. The courts reject such an overly-broad interpretation.[4]

2. The First Amended Petition Involves Issues of Interstate Commerce Only.

WCS' First Amended Petition claims that Envirocare prevented WCS from entering into contracts with a federal agency, which harmed competition in the national market for disposal of federal waste, where the only consumer is the United States. Having made such allegations, WCS cannot support its argument that this case somehow presents issues of intrastate commerce that invoke the Texas Act.

Perhaps to muddy the water, WCS discusses preemption, but this is not a preemption case and the issue is a red herring.[5] Envirocare also does not dispute the strawman argument that the Texas Act does not lose its force simply because a case involves a restraint touching on both interstate and intrastate commerce.[6] Where the only

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[4] *See* cases cited at notes 3, 7.

[5] Under some circumstances a plaintiff could choose either a Texas antitrust claim or a Sherman Act claim. *See* AREEDA ¶ 216. The Texas Act is a valid law; it just does not apply because, under the facts here alleged, the essence of **WCS' own claim**, not any defense, is necessarily federal in nature. WCS' argument that a defense cannot provide the basis for removal is irrelevant. Brief 17-24.

[6] *Elray, Inc. v. Cathodic Protection Serv.*, 507 S.W.2d 570 (Tex.Civ.App. – Houston [14th Dist.] 1974, no writ) stands for

commerce at issue is interstate, however, the Texas Act has no application. *Pounds Photographic Labs, Inc. v. Noritsu America Corp.*, 818 F.2d 1219, 1224 (5th Cir. 1987); *Cherokee Laboratories, Inc. v. Rotary Drilling Services, Inc.*, 383 F.2d 97, 107 (5th Cir. 1967).

WCS' suggestion that the Texas Act applies merely because WCS alleges harm to its business in Texas evinces a basic misunderstanding of the purpose of antitrust law. As noted above, antitrust law is **not** aimed at protecting individual competitors. *Roy B. Taylor Sales*, 28 F.3d at 1382 Rather, antitrust statutes are concerned with the state of competition in the relevant market and the consumers who make purchases therein. *Doctor's Hosp. v. Southeast Medical Alliance, Inc.*, 123 F.3d 301, 306 (5th Cir. 1997). Where the very nature of the commerce at issue, not to mention the sole purchaser, is federal or interstate in nature, then the mere fact that an affected competitor happens to be located in a given state is insufficient to invoke that state's antitrust law. This principle is established by the cases cited herein. *See* notes 3, 7. More fundamentally, it is a principle that flows naturally from the difference between antitrust (which protects competition) and other laws, such as torts (which protect the businessman).

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this unremarkable proposition. There, Texas law applied to an agreement executed in Texas between two Texas entities involving anticompetitive contractual restrictions on Texas manufacturing and Texas sales. The Court's decision that Texas law applied even though both in-state and out-of-state sales were involved is not surprising, but it sheds no light on the rule applicable here.

Simply put, WCS never answers the real question: Why should the State of Texas care about the price paid by the United States Government for disposal of DOE waste?

WCS asserts that Texas law applies "if any component of a transaction affects intrastate commerce," (Brief 29) but what does that mean? The cases make clear that it does **not** mean that any impact felt, or activity occurring, within Texas is sufficient to invoke the Texas Act.[7] Even assuming that the "transaction" analysis fits the instant case, where is the "component" that can be isolated as adversely affecting intrastate commerce in a pleading concerning **federal** waste disposal pursuant to **federal** contracts and a **federal** procurement process, where the only purchaser is a **federal** agency, where the whole point of the case is alleged interference with **federal** authorization to do business, and where the "sole and exclusive" legal authority over the entire matter is proclaimed by WCS itself (R. 933-34) to reside in the **federal** government?

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[7] *See Cherokee*, 383 F.2d 97 (federal, not Texas, antitrust law applied even though conduct occurred in Texas and harmed Texas business); *Denison Mattress Factory v. Spring-Air Co.*, 308 F.2d 403, 413 (5th Cir. 1962) (federal antitrust law applied even though party claiming violation was Texas business engaged in manufacturing and sales in Texas); *Hughes Bros. Mfg. Co. v. Cicero Trust & Sav. Bank*, 24 F.2d 199 (5th Cir. 1928) (transaction interstate in nature despite harm to Texas business); *Destec*, 5 F. Supp. 2d at 464; *Albertype Co. v. Gust Feist Co.*, 114 S.W. 791 (Tex. 1908); *Sloan v. Miami Margarine Co.*, 247 S.W.2d 159 (Tex. Civ. App. – Dallas 1952, writ ref'd n.r.e.); *Green v. Temple-Stuart Co.*, 408 S.W.2d 744, 746 (Tex. Civ. App. – Fort Worth 1966, no writ).

Not so fast, says WCS: what about the DOE "Pantex" site in Amarillo? WCS argues that the District Court "[w]rongly and inappropriately resolv[ed] key factual disputes" in rejecting WCS' argument in this regard. Brief 18 n.18.

Unfortunately for WCS, no fact dispute **had** to be resolved in this issue: as noted above, its own pleading framed the issues in the case. Texas' manifest lack of interest in the economics of DOE waste disposal would not be altered simply because a shipment of such waste happened not to cross state lines. *See E.F.I., Inc. v. Marketers Int'l, Inc.*, 492 S.W.2d 302, 304 (Tex. Civ. App. – Houston [1st Dist.] 1973, writ ref'd n.r.e.) (federal antitrust law governs if intrastate nature of party's business is "merely incidental to the interstate nature of it").

WCS' charge against the District Court is ironic in any event, since removal was based on the face of the First Amended Petition, which contains not a word about Amarillo or Pantex or shipments from there to WCS. WCS' "cite" on this point is not to its pleading, but rather to a page in a WCS Motion filed below. Brief 5 n.8 (*citing* R. 636 [page 6 of its Motion to Remand, in turn citing testimony wherein the word "Pantex" is mentioned]). That WCS would (1) attempt to support a "fact" (itself of questionable import since unpled[8]) with a reference to its own Motion, (2) then "support" its assertion regarding

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[8] The focus is on the face of the pleading, not *post hoc* attempts by plaintiff to add some local color to its allegations. 16 J. MOORE, MOORE'S FEDERAL PRACTICE § 107.41[1][e][ii] at 107-99 (3d ed. 1998) (on remand motion, inquiry focuses on complaint "as it is stated at the time of removal").

Pantex with sheer speculation (*i.e.*, failure to point to a shred of admissible evidence that there even is any radioactive waste at Pantex, or that DOE needs to dispose of it off-site, or that DOE would have any desire to ship it to WCS in any event), and (3) then take the District Court to task for "inappropriately" resolving "key factual disputes" when it was WCS who failed to plead those supposedly-crucial "facts" in the first place, is suggestive of the length to which WCS has strayed from cogent argument.

WCS points to *Pounds*, but the decision is distinguishable since a discrete "component" of the commerce there concerned conduct that implicated the interests of Austin consumers of photo finishing services, who would have benefitted from increased competition and choice in the local marketplace. Indeed, the Court stressed that the conduct at issue "restrict[ed] trade or lessen[ed] competition in the Austin photo lab business," and thus was a matter within the purview and interest of Texas law. *Pounds*, 818 F.2d at 1224.

Segal v. McCall Co., 184 S.W. 188 (Tex 1916), is similar: the Court there was surely correct to find that Texas had an interest where the contract at issue – described as one that "fixes the price at which the vendee shall sell at retail in Texas" – would have restricted the ability of Texas consumers to enjoy the fruits of open competition in the purchase of sewing goods. As with *Pounds*, the contrast between that fact pattern and the one described in the First Amended Petition is apparent.

WCS argues from *Segal* (Brief 30-31) that the Court should focus on where DOE waste would be disposed of,

not where it would be transported from (a quick reversal from its earlier emphasis on the importance of the hypothetical Amarillo-to-WCS shipments). Actually, the focus should be on neither: as noted above, the question here is not one of geography but rather of competitive effect, *i.e.*, whether the price of DOE waste disposal is of interest to Texas law. Geographical references can be a **means** of establishing local competitive impact, which is the real issue; here, however, WCS' attempt to add local flavor to this case is unavailing in light of a pleading that establishes only a federal economic interest in the health of competition in the relevant market.

B. Removal Was Proper Despite the Lack of Preemption.

WCS suggests that removal was inappropriate because removal on "artful pleading" grounds is proper only in cases involving complete federal preemption of state law. Brief 14, 18-24. WCS did not make this argument below and thus waived it. *Association for Retarded Citizens v. Dallas County Mental Health & Mental Retardation Ctr.*, 19 F.3d 241, 243 n.4 (5th Cir. 1994).

The argument is wrong in any event. A federal question is a federal question; it is no less so simply because its federal nature results from something other than preemption. *Carpenter* makes this point: "If the only remedy available to plaintiff is federal, because of preemption **or otherwise**, and the state court necessarily must look to

federal law in passing on the claim, the case is removable. . . . "[9]

Accordingly, this Court has not limited removal to "complete preemption" cases,[10] and the rule advocated by WCS has been criticized. *See* 14B C. WRIGHT, § 3722 at 444-45 (such a rule "hardly can be considered very well established").

This Court wrote in *Carpenter* that "where the plaintiff necessarily has available no legitimate or viable state cause of action, but only a federal claim, he may not avoid removal by artfully casting his federal suit as one arising exclusively under state law." *Carpenter*, 44 F.3d at 366. That passage describes this case: WCS cannot support a state claim and thus it must rely on federal law as surely as a plaintiff must in the preemption context. Federal courts have exclusive jurisdiction over cases arising under the Sherman Act.[11] Removal was therefore appropriate.

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[9] 44 F.3d at 366 (*quoting* 14A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3722 (2d ed. 1985)) (emphasis added).

[10] *See, e.g., De Aguilar v. Boeing Co.*, 47 F.3d 1404 (5th Cir. 1995); *Nunn v. Feltinton*, 294 F.2d 450, 453 (5th Cir. 1961); *Uncle Ben's, Inc. v. Hapag-Lloyd Aktiengelsellschaft*, 855 F.2d 215 (5th Cir. 1988); *Villarreal v. Brown Express, Inc.*, 529 F.2d 1219 (5th Cir. 1976).

[11] *Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 275 (5th Cir. 1976).

C. Removal Was Timely.

It is undisputed that Envirocare filed its notice of removal within 30 days of receipt of the First Amended Petition. The federal nature of WCS' antitrust claims was first revealed in that pleading, and removal was therefore timely.

Comparing WCS' Original Petition with its First Amended Petition reveals significant differences concerning the consumer whose interests were allegedly at stake and the relevant markets allegedly at issue. In sum: the market alleged in the Original Petition included commercial and federal waste; however, the First Amended Petition limited the relevant market to federal (DOE) waste.

The Original Petition recognized the difference between DOE waste and waste from other sources such as commercial companies, *E.g.*, OP¶¶ 21-22 (R. 355-56); ¶ 39 (R. 362). Having done so – and having demonstrated its ability to distinguish between the two – WCS then stated its antitrust causes of action. Absent was any distinction between DOE and non-DOE waste. Also absent was any limitation of WCS' claims to the market for disposal of DOE waste only. *See* OP¶¶ 87-92 (R. 380-81).

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

WASTE CONTROL SPECIALISTS, LLC	§	
v.	§	CIVIL ACTION NO.
	§	MO-98-CA062
ENVIROCARE OF TEXAS, INC., et al.	§	

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO REMAND

(Filed May 01, 1998)

TO THE HONORABLE LUCIUS D. BUNTON:

Defendants Envirocare of Texas, Inc., Envirocare of Utah, Inc., Khosrow B. Semnani, Charles A. Judd, Frank C. Thorley, Billy W. Clayton, and Nancy M. Molleda file this response opposing the motion to remand filed by Plaintiff Waste Control Specialists, LLC ("WCS").

INTRODUCTION

This case arises out of WCS' desire to import radioactive waste from United States Department of Energy ("DOE") sites all over the country to its proposed disposal facility in Andrews County, Texas, without first obtaining any permits or licenses from the U.S. Nuclear Regulatory Commission ("NRC") or the State of Texas, and without being subject to their extensive regulatory oversight designed to protect the public safety and the environment.

Envirocare operates a low-level nuclear disposal site in Utah, which is licensed and permitted by the NRC and State of Utah, and is, accordingly, subject to extensive safety and environmental regulations. In various contexts, Envirocare has participated in governmental proceedings related to WCS' unorthodox proposal. After involved agencies, including DOE, rejected WCS' scheme, WCS sued Defendants in Texas state court for purported violations of Texas antitrust law, defamation and tortious interference. WCS also sued DOE in a separate federal court proceeding for refusing to consider its bid to dispose of nuclear waste from a DOE facility in Ohio.

On March 13, 1998, WCS filed its First Amended Petition in which, for the first time, WCS clarified two important points about its claims: (1) WCS' antitrust claims are based entirely on Envirocare's alleged monopolization of the market for the disposal of federal (DOE) nuclear waste and (2) the relevant market for WCS' antitrust claims is "the entire continental United States." *First Amended Petition* ¶¶ 23, 25, 27 28-32. These clarifications revealed that the facts and allegations underlying WCS' antitrust claims are completely outside the scope of any Texas law – despite WCS' artful pleading of its claim as one under Texas' antitrust statute – and that if such facts and allegations make out any antitrust claim at all, it must be federal in nature.[1] Accordingly, Envirocare removed this action pursuant to 28 U.S.C. §§ 1441(a) and 1446(b).

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[1] As set out in Defendants' Motion to Dismiss filed with this Court on April 20, 1998, WCS has also failed to state a claim under Federal law upon which relief can be granted.

SUMMARY OF ARGUMENT

WCS makes three main arguments for remand. First, it claims that the removal was premised on federal preemption and, since federal antitrust law does not preempt state antitrust law, removal was improper. Contrary to WCS' mischaracterizations, the removal was based on the artful pleading doctrine under which removal is proper, in the words of Professors Wright and Miller when "the only remedy available to plaintiff is federal, because of preemption or otherwise." Here the only antitrust remedy available to WCS is federal, not because of federal preemption but because, under long-established *Texas* law, the Texas antitrust statute does not reach to exclusively interstate transactions – like those pled in WCS' First Amended Petition. Moreover, Texas antitrust law could not reach WCS' amended claims for an even more fundamental reason – they exclusively involve the market for disposal of DOE's low-level nuclear waste, an area that WCS itself insists is "solely and exclusively" governed by federal law.

Second, WCS contends that because WCS is a Texas corporation, its proposed disposal facility is located in Texas and one DOE facility is in Texas, its claims have an intrastate component sufficient to state a claim under the Texas antitrust statute. Under Texas law, however, the plaintiff's venue cannot support a Texas antitrust claim if the transactions at issue are interstate. Everything has to occur somewhere; interstate commerce does not become intrastate commerce simply because a component activity does not straddle state lines. Moreover, the fact that one DOE facility from which WCS hopes to obtain a disposal contract is located within Texas does not change the

conclusion that contracts with the federal government, whether "intrastate" or otherwise, cannot be reached by the Texas antitrust laws.

Finally, WCS claims that Envirocare has waived removal. But, it was only when WCS affirmatively eschewed any claims relating to any intrastate market in the First Amended Petition, by defining the market at issue as wholly interstate and wholly federal in character, that any possible Texas antitrust claim on the face of WCS' pleading was foreclosed. At that time, the case was plainly a case involving purely federal law and federal issues, removable under applicable authorities related to federal question jurisdiction.

WCS CANNOT AVOID FEDERAL JURISDICTION BY ARTFULLY PLEADING AN INVALID STATE ANTITRUST CLAIM

WCS argues that under the "well-pleaded" complaint" rule "[i]t is well-settled that where a plaintiff could maintain claims under *both* federal and state law, such plaintiff may choose to ignore the federal claim and allege *only* state law claims and remain in state court." *Motion to Remand* at 3 (emphasis in original). Precisely. When a plaintiff has valid federal *and* state causes of action, it can choose to assert only the state cause of action, thus barring removal on federal question grounds. *Carpenter v. Wichita Falls I.S.D.*, 44 F.3d 362, 366 (5th Cir. 1995). *But*, as in this case "where the plaintiff necessarily has available no legitimate or viable state cause of action, but only a federal claim, he may not avoid removal by artfully casting his federal suit as one arising exclusively under state law." *Id.; see also Avitts v. Amoco Prod. Co.*, 53

F.3d 690, 693 (5th Cir. 1995) ("Of course, [the well-pleaded complaint rule] does not mean that a plaintiff can avoid federal jurisdiction by simply 'artfully pleading' a federal cause of action in state law terms."). This case falls squarely into the "artful pleading" exception.

As WCS makes clear for the first time in its First Amended Petition, WCS' purported Texas antitrust cause of action is based entirely on interstate, federal transactions. It is well established, however, that the Texas antitrust statute does not reach interstate transactions. *Segall v. McCall Co.*, 184 S.W. 188, 189 (Tex. 1916) ("The State Antitrust Act was not intended to encroach upon a field of legislation [interstate commerce] over which it had no jurisdiction."); *Pounds Photographic Labs v. Noritsu America Corp.*, 818 F.2d 1219, 1224 (5th Cir. 1987) ("The Texas courts have held that the Texas antitrust statutes do not apply to agreements that relate wholly to interstate commerce."); *Cherokee Lab., Inc. v. Rotary Drilling Servs., Inc.*, 383 F.2d 97, 107 (5th Cir. 1967) ("Any restraint on the marketing of the product was imposed in interstate commerce and not after the product had been put into intrastate commerce. The legality *vel non* of the dealings should be tested by the federal antitrust laws and not by those of the State of Texas"), *cert. denied*, 390 US 904 (1968); *Denison Mattress Factory v. Spring-Air Co.*, 308 F.2d 403, 413 (5th Cir. 1962) ("the contract in question was interstate as to execution and performance. The contract should be tested by the Federal antitrust laws. The antitrust laws of the State of Texas do not apply.").

Numerous courts have applied the artful pleading exception and denied remand under exactly the same circumstances presented here – where a plaintiff attempts

to invoke a state law antitrust cause of action for entirely interstate transactions. *In re Nasdaq Market Matters Antitrust Litig.*, 929 F. Supp. 174, 178-79 (S.D.N.Y. 1996); *Mechanical Rubber & Supply v. American Saw & Mfg.*, 747 F. Supp. 1292, 1295 (C.D.Ill. 1990); *Buchanan v. Delaware Valley News*, 571 F. Supp. 868, 872 (E.D.Penn. 1983); *In re Wiring Device Antitrust Litig.*, 498 F. Supp. 79, 82-83 (E.D.N.Y. 1980). In *Mechanical Rubber & Supply* the court explained its holding as follows:

> Where, as here all defendants are unquestionably engaged in interstate commerce, those who are damaged from an alleged restraint of trade find a remedy in the federal, not the state, antitrust laws. This conclusion is buttressed in this case by the longstanding holding of the [relevant state's] Supreme Court . . . that the state antitrust statute under which the plaintiffs have attempted to bring their action applied only to intrastate commerce and does not reach interstate commerce of any kind.

747 F. Supp. at 1295, *quoting In re Wiring Device*, at 82. Exactly the same is true in this case.

There is another reason why WCS has not alleged a claim that can be reached by Texas antitrust law. In its First Amended Petition, WCS made it clear that its antitrust claims *exclusively* involve the market for the disposal of low-level nuclear waste from DOE sites. *First Amended Petition* ¶ 27. Lawyers for WCS confirmed this fact at a hearing before Judge Cowan on April 3, 1998, stating flatly that "[t]his case is about DOE." *Transcript* at

202.[2] WCS' remand motion reiterates that its antitrust claims are based solely on the DOE market: "Here Plaintiff's alleged product market involves low-level radioactive and mixed wastes to be shipped to Texas from DOE sites around the country (including a site in Texas) for disposal in Texas." *Motion to Remand* at 7.

In its federal lawsuit against DOE, WCS acknowledged that "sole and exclusive" authority over the disposal of DOE's low-level nuclear waste rests with the *federal* government, under federal statutes. *See Waste Control Specialists, LLC v. United States Dep't of Energy*, Fifth Circuit Appeal No. 97-11353, Appellee's Brief at 6-8 (attached hereto at Appendix Tab 2). Because, in WCS' words, the federal government has "sole and exclusive" authority over the very contracts that form the basis for WCS' antitrust claim, Texas antitrust law cannot reach these claims for the same reason it cannot reach interstate transactions – because to do so would encroach on Congress' exclusive domain. *See Segall v. McCall Co.*, 184 S.W. at 189 (Texas antitrust statute does not apply to transactions exclusively controlled by federal law).[3]

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[2] Relevant portions of this transcript are attached at Appendix Tab 1.

[3] Indeed, by its very terms the Texas Act does not apply to cases where, as here, the restraint at issue is the result of valid state or federal action. TEX.BUS.&COM.CODE §15.05(g).

WCS' ATTEMPTS TO EVADE THE ARTFUL PLEADING RULE ARE UNAVAILING

Federal Preemption is Irrelevant: The central thesis in WCS' motion to remand is its incorrect assertion that Defendants' removal is premised on federal preemption. The removal was not based on federal preemption, but on the artful pleading rule which allows removal in *any* instance in which a plaintiff attempts to plead a cause of action based on facts that make out a valid federal claim but do not – because of federal preemption or otherwise – support any state law claim. This point was expressly made by the Fifth Circuit in *Carpenter*:

> [I]n many contexts plaintiff's claim may be one that is exclusively governed by federal law, so that the plaintiff necessarily is stating a federal cause of action, whether he chooses to articulate it that way or not. If the only remedy available to plaintiff is federal, *because of preemption or otherwise*, and the state court must necessarily look to federal law in passing on the claim, the case is removable regardless of what is in the pleading.

44 F.3d at 366, *quoting* 14A WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE § 3722, pp. 270-75 (2d ed. 1985) (emphasis added).

In *Mechanical Rubber & Supply*, the court expressly rejected the argument WCS makes here:

> [Defendant] concedes it is clear after *California v. ARC America Corp.*, 490 U.S. 93 . . . (1989), that federal antitrust law is not intended in any direct way to preempt state antitrust law except where there might be a direct conflict between

> the two laws. However, it maintains that its position is not that federal antitrust laws preempt the state antitrust laws, but that the federal antitrust laws apply to acts affecting or occurring in the flow of commerce and that the Illinois antitrust laws apply to acts affecting intrastate commerce.
>
> This Court agrees with the Defendant. Count I is sufficiently federal in character that the Court has subject matter jurisdiction over [Defendant] and the Plaintiff must properly bring this count under the federal antitrust laws.

747 F. Supp. at 1296; *see also Cassel v. Webco Indus., Inc.*, 942 F. Supp. 1409, 1411 (N.D. Okla. 1996) (denying remand based on finding that, while plaintiff's wrongful termination cause of action under state law made out a Title VII claim, it raised no valid claim under state law).

Neither of the two cases cited by WCS held that federal preemption is required for removal. In *Thompson v. Nashua Corp.*, 907 F. Supp. 247 (W.D.Tex 1995), the court expressly found that the plaintiff, whose allegations were based on the San Antonio/South Texas market, had made out a claim under the Texas antitrust laws. *Id.* at 249. Because the plaintiff had made out a valid violation of the Texas antitrust act, the artful pleading rule did not apply. *Id.* In *Mayfield v. Hartford Life Ins. Co.*, 699 F. Supp. 605 (W.D. Tex. 1988), the court remanded an antitrust action filed in state court by the Texas Attorney General alleging antitrust violations in the pricing and marketing of insurance in Texas. The court held that *neither* the artful pleading rule nor the complete preemption doctrine applied to create a basis for removal jurisdiction. *Id.* at 604-05.

Both *Thompson* and *Mayfield* evaluated removal under the artful pleading rule independent of federal preemption; neither suggests that such rule requires federal preemption. Both cases involved state antitrust claims based on a non-federal, *intrastate* market. Because WCS has failed to state an antitrust claim cognizable under Texas law but did plead claims governed by federal law, the artful pleading rule applies under the same analysis employed in *Thompson* and *Mayfield*.

WCS' Claims Do Not Contain An Intrastate Component That Can Be Reached By Texas Antitrust Law: WCS asserts that its claims based on the alleged monopolization of the market for DOE and nuclear waste have an intrastate component sufficient to sustain a cause of action under Texas antitrust law because WCS is a Texas corporation and its disposal facility is located in Texas.[4] *Motion to Remand* at 5-6. WCS also claims that because DOE has a facility in Texas that generates nuclear waste, part of the relevant market is intrastate. *Id.* at 6. WCS is wrong.

First, WCS concedes that the market for disposal of DOE's low-level nuclear waste is under exclusive federal control; thus the DOE transactions on which WCS' antitrust claims are based cannot be subject to the Texas

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[4] Inconsistent with its reliance on the well-pleaded complaint rule, WCS attempts to shore up its position on remand by reference to facts not included in its pleading about the Pantex facilities near Amarillo. The reference to facts outside the pleading can only be viewed as tacit admission by WCS that the Amended Petition is removable on its face.

antitrust statute.[5] Moreover, since WCS now identifies DOE as the only consumer in its market, WCS cannot point to a single Texas consumer whose welfare is at issue.[6] With neither a local market nor any harm to a Texas consumer, WCS' claims are clearly outside the scope of the Texas antitrust statute.[7] Accordingly, WCS' contention that one DOE facility that might someday be subject to a WCS proposal is in Texas is irrelevant.

Second, antitrust allegations about alleged harm to Texas commerce are insufficient to make out a claim under Texas law if the claims involve only the *interstate* movements of goods. In *Green v. Temple-Stuart Co.*, 408 S.W.2d 744, 746 (Tex. Civ. App. – Fort Worth 1966, no writ), the plaintiff, a Texas retailer, sued a Massachusetts furniture manufacturer under the Texas antitrust statute, claiming to have suffered damages as a result of the defendants' agreement with a competing Texas retailer to sell furniture to that retailer only. Even though the plaintiff alleged an antitrust violation affecting intrastate commerce, the court ruled that the Texas statute did not apply

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[5] TEX.BUS.&COM.CODE §15.05(*g*). In fact, Texas law bars private disposal of the radioactive waste at issue in this case. TEX. HEALTH & SAFETY CODE §401.203. WCS has acknowledged that it could only engage in such activity as a DOE contractor within the "sole and exclusive" jurisdiction of federal law.

[6] Consumer welfare is the focus of any antitrust case. *Doctor's Hospital v. Southeast Medical Alliance, Inc.*, 123 F.3d 301, 306 (5th Cir. 1997); *Consolidated Metal Prod., Inc. v. American Petroleum Inst.*, 846 F.2d 284, 292-293 (5th Cir. 1988).

[7] The purpose of the Texas antitrust statute is " . . . to provide the benefits of . . . competition to *consumers in the state*" TEX.BUS.&COM.CODE §15.04. (emphasis added.)

because the agreement at issue was interstate. *Id.* at 746. Likewise, in *Sloan v. Miami Margarine Co.*, 247 S.W.2d 169 (Tex. Civ. App. – Dallas 1952, writ ref'd n.r.e.), the court ruled that an exclusive sale agreement between an Ohio margarine supplier and a Texas retailer, even though it affected intrastate commerce, was not reached by the Texas antitrust statute because the contract itself was interstate. Here, WCS' only bid, to date, similarly relates to a facility in Ohio.

WCS' reliance on *Pounds Photographic Labs v. Noritsu America Corp.*, 818 F.2d 1219 (5th Cir. 1988), and *Elray, Inc. v. Cathodic Protection Service*, 507 S.W.2d 570 (Tex. Civ. App. – Houston [14th Dist.] 1974, no writ), in an unavailing attempt to establish an intrastate component to its claims. In *Pounds Photographic* the court's finding of an intrastate component to the plaintiff's antitrust claims was based on evidence the defendant had "imposed a restriction on the movement of a QSS unit from El Paso to Austin, clearly an impediment to intrastate commerce." *Id.* at 1224. *Elray, Inc.* is even less helpful to WCS. There, the court held that the Texas antitrust statute could be applied to an anticompetitive agreement made in Texas between a Texas partnership and a Texas corporation. That holding is inapplicable to this case in which WCS has, in the First Amended Petition, defined itself as a federal government contractor in a wholly interstate market.

DEFENDANTS' REMOVAL WAS TIMELY

WCS argues that Defendants' removal was untimely, claiming that WCS' Original Petition and other papers

available more than 30 days prior to the date of removal put Defendants' on notice that WCS' antitrust claims involved the interstate disposal of DOE nuclear waste. *Motion to Remand* 7-9.[8] WCS' argument focuses on the wrong issue. As WCS asserts, Defendants have known all along that WCS' claims were based at least in part on the interstate market for the disposal of DOE wastes. The element that made removal possible, and that was not clarified until the First Amended Petition was filed, was that WCS' claims are now based *exclusively* on the interstate DOE market and do not involve any private, intrastate nuclear waste disposal market that would have been sufficient to state antitrust claims under Texas law.[9] WCS presents no evidence that Defendants were aware of this critical fact prior to the filing of the First Amended Petition.

At the very most, the Original Petition and WCS' other papers of which Defendants were aware prior to March 13, 1998 were ambiguous regarding the relevant market on which WCS' claims were based. The Fifth Circuit has held that pleadings that are indeterminate

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[8] WCS also incorrectly accuses Defendants of seeking to delay the disposition of this case by removing it. This allegation is baseless. Defendants have offered to seek to continue ongoing discovery after the removal by appropriate requests to this Court, but WCS declined. Further, there is no reason to believe that this Court cannot or will not proceed as expeditiously as the state court.

[9] Arguably, this critical point was not made completely clear by WCS until even later, at the April 3, 1998 state court hearing, where WCS' lawyers stated that DOE was the only customer relevant to their lawsuit. *See* Appendix, Tab 1.

with regard to removal jurisdiction do not put a defendant on notice to inquire into removability and start the 30-day clock running. *Leffall v. Dallas I.S.D.*, 28 F.3d 521, 525 (5th Cir. 1994); *Akin v. Big Three Indus., Inc.*, 851 F.Supp. 819, 825 (E.D. Tex. 1994). Defendants' removal was timely.

CONCLUSION AND PRAYER

In its First Amended Complaint, WCS asserts antitrust claims based solely on the interstate market for the disposal of low-level nuclear waste generated by DOE. Because the Texas antitrust statute does not reach these claims, the only relief available to WCS is under federal antitrust law, if at all. Because WCS attempted to artfully plead a federal antitrust action as an action under Texas antitrust law, Defendants' removal was proper. Accordingly, Defendants respectfully pray that this Court deny WCS' motion to remand and award Defendants any additional relief to which they may be justly entitled.

Respectfully submitted,

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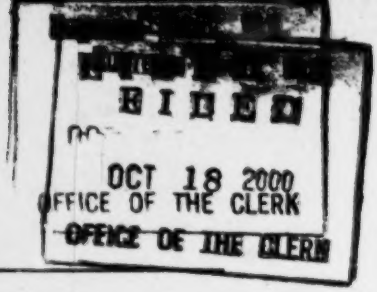

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No. 99-1995

IN THE

Supreme Court of the United States

ENVIROCARE OF TEXAS, INC.; ENVIROCARE OF UTAH, INC.;
KHOSROW B. SEMNANI; CHARLES A. JUDD;
FRANK C. THORLEY,

Petitioners,

v.

WASTE CONTROL SPECIALISTS, LLC,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners Envirocare of Texas, Inc., Envirocare of Utah, Inc., Khosrow B. Semnani, Charles A. Judd, and Frank C. Thorley incorporate herein by reference their Corporate Disclosure Statement set forth in their Petition for Certiorari.

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REPLY TO BRIEF IN OPPOSITION

Envirocare of Texas, Inc. *et al.* ("Envirocare") demonstrated that their petition for certiorari should be granted to resolve important questions concerning the operation of the federal statute governing removal of cases from state to federal courts. Further, certiorari is appropriate because of various splits in authority among the lower federal courts on these recurring issues.

In its opposition to the petition, respondent Waste Control Specialists, LLC ("WCS") claims that two jurisdictional issues preclude the Court from reaching the questions presented by the petition. The purported jurisdictional issues are illusive and this Court needs to definitively resolve the existing split of authority between various circuits and district courts.

I. THE JURISDICTIONAL BARRIERS ARE ILLUSORY.

A. The 30-day rule is not a barrier to review.

WCS asserts first that the 30-day rule for removing a case from state to federal court, 28 U.S.C. § 1446(b), prevents this Court from addressing the questions presented in the petition for certiorari (Br. in Opp. 6-10). The 30-day rule creates no such barrier.

The factual question of how many days it took Envirocare to seek removal is completely irrelevant to the issue of whether to grant certiorari unless the resolution of that question might strip the Court of jurisdiction. Recognizing this point, WCS claims that the 30-day rule is jurisdictional (Br. in Opp. 6-8). This Court has held otherwise in *Powers v. Chesapeake & Ohio Ry. Co.*, 169 U.S. 92 (1898), stating directly that "the time of filing a petition for removal is not essential to the jurisdiction; the provision on that subject is . . . but modal and formal." *Id.* at 98 (internal quotation omitted). WCS dismisses this holding on the ground that it involved the predecessor statute to section 1446(b), which, WCS asserts, "did not contain a specified time period for filing a notice of removal" (Br. in Opp. 6). This is

simply untrue. The removal statute in *Powers* contained a specified time limit – a limit determined by reference to state law. *See Powers*, 169 U.S. at 100.

Powers remains good law today, and the various courts of appeals have concluded – uniformly – that section 1446(b)'s time limits are not jurisdictional. WCS concedes, in a footnote, that "some lower federal courts" have found section 1446(b) to lack jurisdictional consequences (Br. in Opp. 8 n.4). In fact, the uniformity in the decisions is far more impressive than WCS' brief reveals, encompassing more than a dozen court of appeals decisions in a number of different circuits.[1] WCS does not, and cannot, cite a single case holding that the 30-day rule has any sort of jurisdictional implications.[2]

Even if the 30-day rule somehow has jurisdictional implications, the district court carefully considered the issue and found that Envirocare fully complied with the rule (Pet. App. 56a-57a). The district court's finding was not disturbed by the Fifth Circuit and, at this juncture in the proceedings, is the law of the case. This Court generally will not revisit such findings. *See Arizona v. California*, 460 U.S. 605, 618-22 (1983). Indeed, the Court will undertake to revisit another court's

---

[1] *See, e.g., In re Untroyal Goodrich Tire Co.*, 104 F.3d 322, 324 (11th Cir. 1997); *Seaton v. Jabe*, 992 F.2d 79, 81 (6th Cir.1993); *Maniary v. FDIC*, 979 F.2d 782, 784-85 (9th Cir. 1992); *Louisiana v. Sparks*, 978 F.2d 226, 233 (5th Cir. 1992); *Somlyo v. J. Lu-Rob Enterprises, Inc.*, 932 F.2d 1043, 1046 (2d Cir.1991); *Nolan v. Boeing*, 919 F.2d 1058, 1063 n.6 (5th Cir. 1990), *cert. denied*, 499 U.S. 962 (1991); *Loftin v. Rush*, 767 F.2d 800, 805 (11th Cir. 1985); *McLeod v. Cities Service Gas Co.*, 233 F.2d 242, 244 (10th Cir. 1956).

[2] Unable to find even a single holding agreeing with its position, WCS asserts that one *dissenting* Court opinion "referred" to section 1446(b) as a "jurisdictional statute" (Br. in Opp. 8). This is a misleading assertion derived from a truncated quotation. The dissent only stated that the majority opinion had departed "from this Court's practice of strictly construing removal and similar jurisdictional statutes." *See Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 357 (1999) (Rehnquist, C.J., dissenting).

holding only if convinced "that it is clearly erroneous and would work a manifest injustice." *Id.* at 618 n.8. These conditions do not pertain here, as the district court's conclusion is fully supported by the facts.

Section 1446(b) requires that the notice of removal be filed within 30 days of the filing of the pleading "from which it may first be *ascertained* that the case is one which is or has become removable... ." 28 U.S.C. §1446(b) (emphasis added). Envirocare ascertained the basis for removal of this case when it received WCS' amended complaint. WCS' original complaint alleged that Envirocare had acted improperly in "the private-sector market for disposal of mixed wastes and . . . disposal of low-level radioactive wastes." Plaintiff's Orig. Pet. at ¶¶87-89, *quoted in* Pet. App. 57a. After several months, WCS significantly amended its original complaint to allege improper action in a narrower market, specifically the "private disposal market for *DOE's* [that is, United States Department of Energy's] mixed wastes. . . [and] for *DOE's* low-level radioactive wastes." Plaintiff's First Amended Pet. at ¶¶91, 96 (emphases added), *quoted in* Pet. App. 57a. These amendments significantly changed the character of the complaint, making it clear – for the first time – that WCS' action sought damages *solely* for services purchased by the United States government. It was only at this point that Envirocare could clearly "ascertain" the basis for removal. Envirocare promptly filed for removal within 30 days of the filing of the amended complaint (Pet. App. 56a). The amended complaint's change in the market – from disposing low-level waste to disposing Department of Energy waste *only* – redirected the case to actions involving the economic interests solely of a federal government agency and created a basis for removal.

B. Section 1447(d) does not strip the Supreme Court of authority to review decisions of the courts of appeals.

WCS also argues that this Court has been stripped of any jurisdiction to review the Fifth Circuit's decision by 28 U.S.C. § 1447(d), which provides: "An order remanding a case to the

State court from which it was removed is not reviewable on appeal or otherwise . . . ." This petition seeks review not of a district court order remanding a case to the State court, but rather of a substantive final judgment of the Court of Appeals which included an instruction to the district court to remand. The district court here did in fact *later* order that the case be sent back to state court. But Envirocare seeks review not of that order, but of the substantive decision of the Fifth Circuit. Section 1447(d) simply does not apply to its petition for certiorari.

Two decisions of this Court hold – unanimously – that section 1447(d)'s predecessor statute did not block Court review of decisions by the Court of Appeals returning removed cases to the district courts with instructions to remand to state court. *See Aetna Casualty & Surety Co. v. Flowers*, 330 U.S. 464, 466-67 (1947); *Gay v. Ruff*, 292 U.S. 25, 30-31 (1934). WCS contends that these controlling decisions should be disregarded because they arose under the predecessor statute. WCS claims: "[I]n 1948, however, immediately after *Aetna* summarily reaffirmed the holding of *Gay*, Congress enacted the broad language of section 1447(d)," which in WCS's view blocks review here. Br. in Opp. 11.

WCS' description of the congressional enactment of section 1447(d) is erroneous. It is true that in 1948, "immediately after *Aetna*," Congress modified the federal removal statute as part of the comprehensive redrafting of all the judicial procedures contained in title 28. Contrary to WCS' representation, Congress did *not* enact section 1447(d) in 1948. In fact, in that year Congress enacted section 1447 without any provision blocking appellate review of remand orders. 62 Stat. 939, *see* U.S. Code Cong. Serv., 80th Cong., 2d Sess. 1858-59 (1948). It was in the following year, 1949, that Congress passed corrective legislation to fix technical problems detected in the massive revisions to title 28. As both the Senate and House Reports to the 1949 Act explain, Congress desired to "correct[] typographical and other minor errors, and clarif[y] the language of some sections to conform more closely to the original law, or

to remove ambiguities have been discovered." S. Rep. No. 303, 81st Cong., 1st sess., *reprinted in* 1949 U.S. Code Cong. Serv. 1248; H. Rep. No. 352, 81st Cong., 1st Sess., *reprinted in* 1949 U.S. Code Cong. Serv. 1254. Congress enacted section 1447(d) as part of this 1949 corrective legislation, 63 Stat. 102, not as part of the 1948 revisions to the Judiciary Act, strongly suggesting that differences between section 1447(d) and its predecessor version were not substantive.

The legislative history indicates specifically that Congress' purpose in enacting section 1447(d) was "to remove any doubt that the *former law* as to the finality of an order of remand to a State court is *continued.*" H. Rep. No. 352, 81st Cong., 1st Sess., *reprinted in* 1949 U.S. Code. Serv. 1268 (emphases added). Thus, by inaccurately claiming that section 1447(d) was enacted in 1948 "immediately" after *Aetna*, WCS misleadingly creates the impression that the subsection was designed to overrule former law. In fact Congress' express purpose was to "continue" the "former law" as to finality – that obviously included *Aetna* and *Gay,* holding that this Court has authority to review remand decisions by the court of appeals.

This legislative history simply confirms what common sense indicates, as there is no reason to conclude that Congress intended to strip this Court of its authority to review court of appeals decisions in this particular area. It is one thing for Congress to declare that if the removal issue can be quickly and immediately resolved by the trial court, appellate review is not permitted. It would be quite another thing for Congress to decide that final *appellate* authority on the law in this area resides not in this Court but in the various courts of appeals around the country. *See Gay*, 292 U.S. at 30-31; *see also Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 76 (1996) (noting Congress established a "procedure calling for expeditious superintendence [of removal issues] *by district courts*" and precluding review of "*district court* orders remanding cases to state courts" but that "Congress did not similarly exclude appellate review of refusals to remand" (emphases added)). Such a drastic restructuring of the normal appellate process

should not be casually imputed to Congress. *See Felker v. Turpin*, 518 U.S. 651, 661 (1996) (refusing to find repeal by implication of Supreme Court authority).[3]

II. THE PETITION PRESENTS IMPORTANT AND RECURRING QUESTIONS ABOUT REMOVAL

When it finally addresses the merits of the petition, WCS mischaracterizes what the Fifth Circuit held. This allows WCS to demolish a series of strawmen, rather than deny the importance of the issues raised by the petition. When fully understood, the Fifth Circuit's decision raises several crucial questions about the operation of the federal removal statute. The importance of these questions cries out for further review in this Court for the reasons explained in Envirocare's petition for certiorari.

A. It is necessary to resolve whether preemption is the only basis for "artful pleading" removal.

The Fifth Circuit's decision below concludes that removal on "artful pleading" grounds can never be proper unless the case involves complete federal preemption of state law. The petition expounds on why this conclusion rests on a misinterpretation of this Court's decision in *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470 (1998). The petition further explains that courts and commentators have reached different interpretations of *Rivet* and, more generally, the scope of "artful pleading" removal (Cert. Pet. 13-18).

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[3] WCS enlists a red herring in its effort to deflect this Court from the merits of the petition, claiming that a stay of state proceedings could not be entered. (Br. in Opp. 10). If this Court decides to review the case, the Texas court will undoubtedly stay the proceedings by motion or on its own accord to permit this Court to review the issues in an orderly fashion. In the highly unlikely event that the Texas court will not grant a stay, this Court can enjoin a state proceeding "where necessary in aid of its jurisdiction." 28 U.S.C. § 2283.

In response, WCS claims that the Fifth Circuit did not conclude that complete preemption is the only basis for artful pleading removal. WCS baldly asserts that "the court below did not opine or suggest that a state law claim which embodies a 'substantial-federal-question' could not be removed . . . ." (Br. in Opp. 13). From this initial premise, WCS goes on to argue that certiorari is inappropriate (Br. in Opp. 13-23).

WCS simply ignores what the Fifth Circuit actually said: "Without complete preemption, the artful pleading doctrine does not apply" (Pet. App. 4a). It is hard to understand how WCS can construe this statement as meaning anything other than what it says – that without the required "complete preemption," the artful pleading doctrine simply *"does not apply."*

Even if there were some ambiguity, the Fifth Circuit continues in the next three sentences of its opinion to quote from and examine the passage in this Court's decision in *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 475 (1998), which discusses complete preemption – and only complete preemption – as basis for removal. As explained at greater length in Envirocare's petition (Cert. Pet. 14-16), this is the very passage that noted commentators have concluded "may have given indirect credence to the assertion that the artful-pleading doctrine extends only to the complete preemption context." 14B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* section 3722 at 445 (quoting the same passage in *Rivet*, 522 U.S. at 475, as quoted by the Fifth Circuit); *see also* Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 Tex. L. Rev. 1781, 1825-26 (1998) (quoting the same passage in *Rivet*, noting that it might be viewed as subsuming other grounds for artful-pleading removal, and arguing that this is not a proper interpretation).

District courts in the Fifth Circuit are already reading the decision below as eliminating other forms of artful pleading removal. In *Greer v. Majr Financial Corp.*, 105 F.Supp.2d 583

(S.D. Miss. 2000),[4] the district court first rejected complete preemption as the basis for removal. *Id.* at 588-91. The court then turned to the possibility of removal on the alternative basis of a "substantial federal question." Unlike WCS' artful recharacterization of the decision below, the district court found differently.

> In *Waste Control Specialists*, the Fifth Circuit declared that "[w]ithout complete preemption, the artful pleading doctrine does not apply," *id.* at 783, and thus confirmed (or clarified) that the practice of a removal court's seeking to determine whether the real nature of a claim is federal, regardless of the plaintiff's characterization, is correctly *confined* . . . to areas of the law preempted by federal substantive law.

Greer, 105 F.Supp.2d at 592 (emphasis added) (internal citation omitted). That court also noted the Fifth Circuit's new approach was a departure from previous cases. *Id.* at 592-93 n.7. Finally, the district court observed – as Envirocare observed in its petition for certiorari (Cert. Pet. 15) – that the approach of the Fifth Circuit below differed from "a number of other courts and at least one leading commentator" who have "treated artful pleading and complete preemption as separate bases for removal, or at least had not treated the 'artful pleading' doctrine as necessarily limited to cases of complete preemption." *Id.* at 593 n.7 (*citing* Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 Tex L. Rev. 1781 (1998)).

Since the Fifth Circuit's decision did not leave room for other forms of artful pleading removal, it conflicts with various other circuits allowing removal on grounds other than complete preemption (Cert. Pet. 17 n.3), causing confusion in the lower courts as to the meaning of *Rivet* (Cert. Pet. 14-16).[5]

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[4] This case was decided ten days *after* Envirocare's petition for certiorari.

[5] *In re State of Texas*, 110 F.Supp.2d 514, 525 (E.D. Tex. 2000) ("the artful pleading doctrine applies only in cases where federal law completely preempts plaintiff's state-law cause of action"; *citing* decision

B. Certiorari is necessary to resolve a split in the circuits over application of *Caterpillar, Inc. v. Lewis.*

Envirocare's petition explains how the Fifth Circuit's decision conflicts with *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996) (Cert. Pet. 18-28). In *Caterpillar*, despite improper removal initially, the trial court had federal jurisdiction at the time of trial and judgment. This Court concluded that, "[t]o wipe out the adjudication post judgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice." *Id.* at 77. This Court stated: "[w]e hold that a District Court's error in failing to remand a case improperly removed is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered." *Id. at 64*. Here, the Fifth Circuit held that, despite the existence of federal jurisdiction at the time of judgment, *Caterpillar* was inapplicable and that the district court adjudication should be voided (Pet. App. 10a). Because the district court here dismissed the case under Rule 12(b)(6) rather than Rule 56, the Fifth Circuit found consideration of judicial economy inapplicable and vacated the district court's ruling (Pet. App. 10a-11a).

The Fifth Circuit's rule is nonsensical and illustrates the need for clarifying the application of *Caterpillar*. The district court could have granted summary judgment (under Rule 56) rather than a dismissal for failure to state claim (under Rule 12(b)(6)). The fact that the district court chose to dismiss under an even *more* demanding standard should not control whether its decision should be vacated.

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below). WCS also asserts that Envirocare did not press below the possibility of other kinds of artful pleading removal besides complete preemption (Br. in Opp. at 16). This is untrue. Envirocare's brief to the Fifth Circuit developed the argument at length. *See* Brief for Appellees at 18-19, *Waste Control Specialists v. Envirocare*, 199 F.3d 781 (5th Cir. 2000) (No. 98-50952).

WCS chooses not to defend the Fifth Circuit's illogical distinction between a summary judgment and a dismissal for failure to state a claim, but instead argues that the Fifth Circuit did not adopt a per se rule (Br. in Opp. 28). Here again, WCS' position is refuted by the language in the Fifth Circuit's opinion: "Though the reach of the expression 'trial on the merits' is unclear in this context, we hold that it stops short of a Rule 12(b)(6) dismissal" (Pet. App. 10a).

The split in the circuit courts is clearly revealed, however, by comparing the decision below with *Parrino v. FHP, Inc.*, 146 F.3d 699 (9th Cir. 1998). There, the Ninth Circuit refused to overturn a Rule 12(b)(6) dismissal on facts substantively indistinguishable from this case. The Ninth Circuit read *Caterpillar* as holding that "a procedural defect existing at the time of removal but cured prior to entry of judgment does not warrant reversal and remand of the matter to state court." *Id.* at 703. As demonstrated by this split in authority and the other conflicting cases cited in our petition (Cert. Pet. 22), this Court needs to provide further guidance on the practical scope and application of *Caterpillar*. *See generally* 14B Wright, Miller & Cooper, *Federal Practice and Procedure* section 3723, at 588 (noting the "somewhat more contentious and as yet undefined doctrine" of *Caterpillar*).

CONCLUSION

The petition for certiorari should be granted.

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